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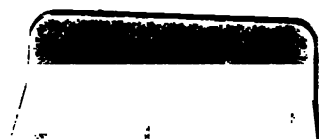
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CASES
OF
CONTROVERTED ELECTIONS,
DETERMINED IN
COMMITTEES
OF
THE HOUSE OF COMMONS,
IN THE
SECOND PARLIAMENT
OF THE REIGN OF
QUEEN VICTORIA,

**BEING THE THIRD PARLIAMENT SINCE THE PASSING OF THE ACTS FOR THE AMENDMENT
OF THE REPRESENTATION OF THE PEOPLE.**

BY
THOMAS FALCONER, ESQ., OF LINCOLN'S INN,
AND
EDWARD H. FITZHERBERT, ESQ. OF THE INNER TEMPLE,
BARRISTERS-AT-LAW.



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THE writs to summon the Parliament to which these Reports relate were tested on July 17th, 1837, and were made returnable September 11th 1837. An obscurity in one or two cases, reported in this volume, will be removed by noticing these dates.

Since the remarks of Mr. Fitzherbert upon the law of Elections contained in the Introduction, were published, an Act has been passed, constituting new tribunals for the trial of Controverted Elections—an act that will be found deficient in not having settled some conflicting decisions upon the law, and in making no sufficient provision to produce an uniformity of decision, or to lessen the enormous expenses—especially in Scotch and Irish cases—of the present system.

By two provisions the most general causes of complaint connected with Election petitions might be removed.

First, by Committees giving authority to the first decisions made upon points of law. Discussions upon the same questions are raised upon every occasion, no matter how often they have been determined. The sittings of Committees are prolonged, not in hearing arguments upon new questions of law, but in hearing all the arguments that Counsel have ever heard of upon the same subject, repeated and refined upon. There is more than a mere chance that any former decision will be reversed. But if Committees adopted former decisions as authority, many discussions would be put an end to and some uniformity of determination might be obtained. If in every case, it was understood that a binding precedent was to be made which might subsequently affect the political interests of the parties making it, more caution and far less partiality

would probably be exhibited than will be the case, so long as an improper decision is merely connected with the present defeat of an opponent, or the success of a partisan. If a rule, thus established, should be objectionable, the Legislature alone should interfere to alter it.

Secondly, many serious evils would be removed by making, as it is frequently termed, the Register final; that is, preventing, after the Register has been revised by the Barrister, the qualification of any person being questioned before a Committee, whose name is upon it. The objections to this are three: 1st. That the Barrister may act corruptly; 2nd. That a scrutiny of bad votes would be prevented; 3rd. That an election may be turned by the votes of persons having merely colourable qualifications.

The answer to the first objection is, that no Barrister can foresee in what way the persons whom he registers will vote. It is true, that the attorneys or agents of different parties appear before him and contest the claim to register of persons whom they believe to be of adverse politics, but little experience is necessary to know, that the politics of the attorney opposing or supporting a vote in a registration court, give no security that the vote will be in favour of his party at an election. When the Barrister, also, decides one case, others of a similar character are immediately presented to him, and he is utterly unable to act as a partisan in his decisions, without exhibiting gross inconsistency and exposing himself to discredit and dishonour. This very same argument upon the possible abuse of authority might be urged, with far more reason, against any tribunal that can be constituted of Members of the House of Commons.

The answer to the second objection is, that though Committees upon a scrutiny, may strike off many bad votes they never strike off *all*, and that their ultimate decision never represents the result of a complete investigation of the votes upon the poll. A scrutiny ends—not by

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the exhaustion of the objections that may be or are made to the votes recorded—but upon account of one party being unable to sustain the expense of its continuance. It is a mere contest between private persons and not an examination conducted by persons acting for the public, and ascertaining for the public, the *bond fide* character of all the votes given. It is, also, an invariable rule in English cases, that Committees will not examine into the validity of the votes of persons whose right to register has not been objected to before the Revising Barrister, yet there is less reason to sanction the oversight—real or pretended—of bad votes, by electors or the agents of candidates, than for the Legislature to enact that the decisions of the Barrister shall not be reviewed by a Committee. Why should the judicial decision of the Barrister be questioned and yet the oversight of an elector to object to a bad qualification, enable the possessor of a bad qualification to vote, and his vote to be irremovable from the poll?

The answer to the third objection is, that no evil is done to the public by some persons having colourable qualifications being upon the Register. No precautions can prevent some such persons being upon it. All that the Legislature can do is to make a general rule, and provide means to prevent its being evaded to any serious extent. It cannot prevent its evasion in all cases. It can only secure its general observance. With this view the system of registration that it has established is amply sufficient, independent of any aid that can be received from Committees. The line also, between persons who are upon the register in respect of valid titles—and those, the defects of whose titles escape detection before a Revising Barrister—is so indistinct, that no interest can be represented by them different from that which the Legislature intended to be represented. It is true that here and there an election may be turned by one vote, but this is an event that the Legislature ought not to regard, and

which may as easily happen by a colourable qualification not being objected to before a Revising Barrister, and therefore, not subject to a revision before a Committee, as that a Revising Barrister should determine a colourable to be a legal and valid qualification. Indeed the reasons for reviewing the decisions of the Barrister, are more urgent in favour of opening the entire Register, that is, of questioning before Committees votes unobjected to, as well as votes objected to, before him, than for opening it partially. But the evils of opening the Register are so great, that in English cases it only takes place in those instances in which an objection has been taken at the registration; though, the opening of the Register in the cases in which the Barrister has not received objections, and closing it in cases in which he has decided—expensive and harrassing as such a process would be—would secure the investigation of colourable qualifications more completely than the present practice, if such an investigation was really considered to be of importance.

That the present system should long continue appears almost impossible. These Reports present many proofs of the necessity for its change.

In completing this volume, the Reporters present their thanks to Mr. Ebdon, barrister-at-law, for his assistance upon several occasions; to Mr. Chalmers, of the House of Commons, whose courtesy and whose attention to every request they most readily acknowledge, and also to the agents employed in the cases reported.

T. F.

9, *Gray's Inn Square*.

INTRODUCTION.

THE Reports contained in this volume extend from the session of 1835 to the close of the session of 1838, and the circulation of the different parts of it, as they have severally been published, has been such as to prove that they have been thought useful by those engaged in the practice and in the judicial administration of Election Law. It will be seen that, in most of the cases here reported, the observations of counsel are condensed, so as merely to present an outline of the grounds on which they relied; but whenever any argument appeared peculiarly calculated to elucidate a difficult point of law, or to explain the principles applicable to a question of real importance, we have given it at full length, and some of these arguments will be found to possess more than ordinary interest. It has been our endeavour to omit no decision which could be valuable as a precedent; and in selecting the cases which are here reported we have been actuated by the double object of making our volume as useful to the legal profession as its nature would allow, and also of supplying the members of the legislature and the public with accurate information respecting the Election Committees of the present parliament. It is not our intention to express any opinion as to the merits of the Committees whose decisions are here reported, but to present a faithful outline of their

proceedings. A general expectation is prevalent that considerable alterations will be proposed during the present session for the future regulation of the trial of controverted elections. (1) We hope that the materials here given will be found to throw light on many of the questions which may arise during the discussion of the measures intended to be proposed. We also hope that some suggestions which we have ventured to offer, founded on a practical observation of the defects of the present system, may prove calculated to simplify the inquiries before Election Committees and to insure greater respect for their decisions.

It is so difficult a task to touch, in a work like the present, with success, and without giving offence on the alleged imperfections of the tribunal whose decisions are reported, that we should in some respects have preferred to have made the observations contained in this Introduction the subject of a separate publication. But the practice has been introduced by our predecessors of accompanying their Reports on Controverted Elections by introductions, explanatory either of the origin and powers of Committees, (2) or of the evils and abuses of election law, with hints for its improvement, (3) or of the nature of the proceedings of the House of Commons in matters relating to elections, (4) or of the alterations introduced into Election Law by recent statutory enactments, (5) and we feel ourselves in some measure bound by the precedent. For,

(1) The notices of Lord Mahon and Sir R. Peel shew that the subject is likely to be taken up in earnest.—*Proceedings of the House of Commons*, 5th Feb. 1839, p. 10.

(2) Douglas (Lord Glenbervie), vol. I. Introduction.

(3) Luders, vol. I. Preface, which appears to have been written during an excited state of parties, and whilst "griels were green." See p. 24. It is encouraging to find that many of the suggestions of Luders relating to changes in the constitution of the Committee, and the regulation of its proceedings were subsequently adopted.

(4) Peckwell, vol. I. p. 17.

(5) Perry & Knapp, Introduction.

when we consider the mode in which Election Committees have of late been denounced, both within the walls of the House of Commons and without, to an extent and in terms unparalleled in history, we feel that no circumstances could possibly have occurred more calculated to render some introductory remarks necessary than those under which the present volume has been written. We have little doubt but that we might have found examples in the present reports calculated to bear out many of the remarks contained in this Introduction. But, although some of our predecessors have (1) not hesitated to canvass the merits of such of the cases in their Reports as were of questionable authority, we have, on the contrary, in general scrupulously abstained from such a course, and have contented ourselves with such illustrations as could be deduced from a retrospective view of the working of the system during former parliaments.

We shall make no apology for speaking unreservedly of the conduct and character of Election Committees which have sat during any parliament prior to the commencement of the present reign. Their proceedings are now become matters of history; and we are not aware of any motive, either of prudence or propriety, which should restrain us from freely canvassing their merits. If the subject were new, and we were now called upon for the first time to inquire into and pronounce on the practical working of this tribunal during former parliaments, we should perhaps shrink from embarking in so boundless an investigation. But the subject is not new. It is one on which men's minds are made up, and on which public opinion has been so strongly and unequivocally expressed that it can neither be misunderstood or concealed. However, therefore, we might be disposed to vindicate, or palliate, or excuse the decisions of any particular Committee, we fear that we

(6) Especially Luders and Peckwell.

must reluctantly admit that, at the period at which these Reports commence, the tribunal had fallen into discredit, and that men of all parties, of all ranks, of all opinions, of every degree of intelligence, and of every shade of principles were agreed in condemning it.

We were fully aware of the existence of such an opinion when we first undertook this work ; but we considered that the objects which we proposed to ourselves, which have already been stated, were worthy of being pursued. It appeared to us clear that a complete change would be made in the tribunal; yet highly probable that such change would not be effected till after the present volume should be completed. With these expectations, we ventured to indulge a hope, that we might be able to prepare a work of sufficient utility to insure for it a circulation amongst members of the legislature of all parties, when the anticipated change of system should be under discussion. Hitherto, nothing has occurred to damp these expectations; and as our work has advanced, we have been led to consider that it may probably possess some historical value, by putting it within the power of future writers on parliamentary history, to deduce correct conclusions respecting a tribunal, which may, probably, continue to excite interest and attention long after it has passed away.

We would gladly contribute to prevent the recurrence of any abuses which may, in times past, have arisen in Election Committees; it is with this object that the existence of an opinion has been alluded to, which every man of right feeling must lament, and it is with this object that the causes will be fearlessly investigated, which led to the adoption of that opinion by the public.

There are numerous things relating to Election Committees, which, in some measure, elude description, and can only be understood by personal observation. Many of these are things which produce a great impression

when witnessed for the first time, but are scarcely noticed by those who come in daily contact with the system. We might instance the extraordinary eagerness shewn by members to serve on Election Committees, although the service is known to be more irksome and laborious, and to occasion greater confinement and sacrifice of time, than almost any other parliamentary duty. We might also allude to the rules for striking, which are perfectly well known; (1) the effect of which is in the great majority of instances to exclude the most competent of those who are drawn by ballot from sitting on the Committee, merely on account of their competence. These, and a variety of other peculiarities, if minutely entered into, and accurately depicted, could scarcely fail to attract considerable interest. But these minutiae are not the causes which led to that opinion on the part of the public, which we have above expressed and deplored; and as it is quite foreign to our object to introduce new topics of irritation into a subject unfortunately already too much beset with difficulties, we shall pass them by unnoticed.

In pursuing this investigation, we shall avail ourselves of the expressions of opinion which are to be met with in some of the speeches of different members of the House of Commons in the course of the numerous debates on Controverted Elections. (2) But in referring to the reported speeches on the abuses in Election Committees,

(1) "Striking" is familiarly known in the lobby of the House of Commons by the appellation of "knocking the brains out of a Committee."—*Mirror of Parliament for 1836*, p. 328. *Ditto for 1837—8*, p. 192.

(2) If our object were to prove to demonstration the necessity of the changes, which are suggested in the latter part of this Introduction, we should refer to the different volumes of Election Reports for our illustrations, beginning with Douglas. We call attention to those sources of information under the belief that no one can adequately legislate on the subject who does not make considerable research into it; but it will be sufficient for our present purpose for us to confine ourselves to those data, which are unanimously admitted by all parties both within and out of the House.

we shall endeavour to confine ourselves to those which are distinguished by the calm and moderate spirit which they evince, and shall avoid as much as possible any allusion to the passionate invective, the bitter raillery and indignant sarcasm with which many of the speeches on this subject abound. Let the evil be once fairly traced to its source, and let it be done in such a manner as to merit the sanction and approbation of men of all parties, and we hesitate not to say, that it will be easy to point out a remedy; in fact, the mere enunciation of the evil will of itself naturally suggest the obvious cure.

On the 25th of February, 1836, Mr. C. Buller moved for the appointment of a select committee on Controverted Elections. (1) The debate on that occasion points out so many of the evils of the system, that we shall give a short summary of those parts of the speeches which bear on the present inquiry.

Mr. C. Buller, after some introductory remarks, proceeded thus:—"It is the general opinion of this House, and of the country, that of all our tribunals, the Election Committees of this House are alike the most expensive, dilatory, and incompetent; and, I am ashamed to say it, there is so much suspicion entertained of the injustice of these Committees, which does not attach to any other of our tribunals, that the subject calls loudly for inquiry and remedy." (1) "I know it is a delicate matter to touch upon, but I must say it is equally felt on both sides." (2) "When the public hear of either side complaining, they generally steer a middle course, and believe that both are blameable: and if they were admitted behind the curtain they would, I think, entertain this opinion still more strongly. What would the public think of honourable gentlemen coming down to perform their functions under the terror of 'the whip,' which has been applied during the last two or three

(1) *Mirror of Parliament*, 1836, p. 322.

(2) *Ibid*, p. 323.

sessions most severely? What would they say if they were admitted into the House when the ballot for an Election Committee is going on, and heard the expression of feeling, accordingly as the chance turns up for and against each party—if they heard the expressions of approbation on the fortunate side, or the low murmurs of discontent on the other? What would the public think of honourable Members crying out shame upon their friends who neglect to answer to their names when called—of their unwillingness to admit the excuse of age and official duties in their justification—and of their congratulations of each other, according to the constitution of the Committee appointed? How would it astonish the public, who ought to have the greatest confidence in our fairness, to hear one honourable Member say to another, ‘I am glad that you have got such a good Committee?’ or ‘I have such a bad one that I may as well strike at once; it is of no use going on!’ There was a specimen given last session of the manner in which the public judge of such things. When the Canterbury Committee was struck, it had upon it a large proportion of honourable Members who sit upon the opposite side of the House; and on that very day the chief supporter of the petition at Canterbury stuck up the names of the Committee in his window, and the letter C against the names of the conservatives, and that of R opposite to those of the reformers, which was followed by an illumination in anticipation of the triumph that was supposed to be the inevitable result of the construction of the Committee—by which, I say, the greatest insult was offered to this honourable House. It is a singular circumstance that two or three sessions ago there were two Committees appointed to try Controverted Elections, in each of which charges of bribery were made. The question of course turned upon the proof of agency. In the one Committee it was established, and in the other it was not. The majority and minority

in both cases were the same—six and five: in every division the numbers were exactly the same.”(1)

“ The real misfortune is, that the Committees are incompetent to execute the work which is given them to do; they know nothing of the law, nor have any acquaintance with the principles on which it is founded.”(2)

The *Chancellor of the Exchequer* spoke next and said, “ I believe I speak only the sentiments of every Member of this House, when I express the satisfaction which I felt on hearing the clear and able statement which my honourable and learned friend has just made.”(3) “ If a foreigner had heard the statements of my honourable and learned friend, he might have been induced to suspect that they were exaggerated, but, for my own part, I could enumerate many cases which would fully bear out all that he has said.”(4) “ The description which the honourable and learned Member has given of an election ballot was dramatic, but it is true. It was a drama founded on real life. If there be a muster of one party on such an occasion, there must of necessity be a muster of another. But all such proceedings are derogatory to the dignity of the House.”(5)

Mr. *Williams Wynn*, in a speech replete with valuable observations, concurred in the sentiments of the Chancellor of the Exchequer, and spoke highly of the ability, industry, and temper with which the subject had been brought forward. He also bore testimony to the confidence which was felt in the decisions of the tribunal for forty or fifty years after the passing of the *Grenville Act*, during which period party politics were not introduced into the proceedings of Committees. (6)

Mr. *Bernal*, after some judicious suggestions, made the following manly avowal. “ When I first came into Par-

(1) *Mirror of Parliament*, 1836, p. 323.

(2) *Ibid*, 324.

(3) *Ibid*, 325.

(4) *Ibid*.

(5) *Ibid*, 326.

(6) *Ibid*.

liament, I thought no situation so anomalous as that which obliged a Member to take an oath to act impartially as a jurymen, while he undertook it with a determination to act as a partisan. I have witnessed scenes in Committees which I am ashamed to recollect. The basis of the evil, however, is party feeling; party is the bane of the proceedings of Election Committees. Every man (I speak not of what his politics may be), on these subjects is guided by party considerations." (1)

Sir F. *Pollock* concurred in the opinions of those who had preceded him, and added :—"I do not mean to go into any discussion upon the subject, but I anticipate very little contradiction when I state, that the evils of the present system are universally felt and acknowledged. Before I had the honour of a seat in the House of Commons, it was my misfortune I may almost say, to practise before many Election Committees; and of all the tribunals I have ever known, a Committee of that description is the very last I should feel any disposition to attend." (2)

In the following session we meet with a similar observation of *The Attorney-General*. "The present tribunals possess neither the confidence of the House nor the country. I think that the practice which prevails on both sides of whipping for a ballot, is quite sufficient to produce an unfavourable effect on the public." (3)

We have given full extracts from the *Mirror of Parliament*, for the benefit of those who have not leisure to investigate the subject for themselves. But all the debates on Controverted Elections during the last three years are full of interest (4), and will amply repay those who may study them.

(1) *Mirror of Parliament*, 1836, p. 327.

(2) *Ibid.*

(3) *Ibid*, 1837, p. 1497.

(4) We have forborne to give extracts from the speeches on Controverted Elections in the last session for the reasons previously mentioned, we regret this the less on account of the asperity and violence by which many of those debates were characterised.

No one who reads the above extracts will have any difficulty in precisely understanding the nature of the abuses which existed in this tribunal at the time when the Select Committee on Controverted Elections was moved for. It is obvious that the House of Commons was at that time divided into two great parties; that there was in every case a struggle between the two parties to obtain a majority on the ballot, and that after this object had been effected, the final result usually followed as a natural and inevitable consequence. Or to state the case more plainly, *the numerical majority of every Election Committee consisted exclusively of members of the same party, the decisions of the Committee were merely the decisions of that majority, and consequently, were almost invariably party decisions.*

Every one of the least degree of impartiality, will see that these observations are not designed to serve any party purpose. Neither are they designed to lend the slightest countenance to those odious charges of corruption and violation of oaths, which in moments of angry excitement have been too unscrupulously preferred. It is impossible to feel surprised that such charges should have been made, especially when we reflect that they were made by persons who had been stung to the quick by decisions which they deemed to be unjust. But no man of ordinary good feeling can in his calmer moments seriously contemplate the embarrassing position in which the political majority of every Election Committee is placed, without making great allowances for any errors which they may commit. Let such a person consider the excitement, the passions, the prejudices, the personal interests which are involved. Let him consider that the franchise of every adverse voter, and the seat of each adverse candidate is left wholly and irrevocably at the disposal of that majority. Let him consider that there is no appeal against the decisions of that majo-

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rity, and that every individual member of it is completely irresponsible to any one except his own political associates. Let him consider that no member can vote in favour of his political opponent without at least incurring some risk of being denounced as a deserter of his friends, and a traitor to his party. Let any one impartially weigh the topics to which we have here alluded, and then let him ask himself if the things which he disapproves in the conduct of these Committees are not fully to be accounted for by the absence of that moderation, which ought always to accompany irresponsible power, but unfortunately rarely does so. (1) *The system was in fault far more than those who took advantage of its defects.*

It is impolitic to select members by ballot to fill positions too trying to be properly sustained by any but men of most extraordinary courage, firmness, and integrity. It is impolitic unnecessarily to place any man, however he may have been selected, in a position in which even the most unsullied character, and the strictest impartiality would fail to preserve him from being subjected to opprobrious accusations.

Before we offer any suggestions for the remedy of the evils which have been described, we shall make a few remarks on the leading plans of alteration which have been already brought forward in Parliament. Mr. C. Buller proposed the diminution of the numbers of the Committees, the substitution of an open challenge in the House in lieu of striking, the appointment of assessors, and the publication of the names of the assentients and

(1) Lorsque, dans un siècle ou dans un gouvernement, on voit les divers corps de l'état chercher à augmenter leur autorité, et à prendre les uns sur les autres de certains avantages, on se tromperait souvent si l'on regardait leurs entreprises comme une marque certain de leur corruption. Par un malheur attaché à la condition humaine, les grands hommes modérés sont rares.—*L'Esprit Des Loix*, Liv. 28, c. 41.

dissentients to every resolution. (1) The proposal of reducing the numbers of the Committee was not treated by Mr. C. *Buller* himself as an essential part of his bill. (2) The evils of an open challenge were so ably pointed out by Sir W. *Follett*, (3) that his observations cannot fail to carry conviction. The policy of publishing lists of assentients and dissentients in all cases is at least questionable; the power of the House to order such lists to be published, may operate as a salutary check, if only exercised in extreme cases, but if the practice were to be indiscriminately adopted, it would probably defeat its own object. The only remaining part of this plan is, the appointment of fixed assessors, the chief objection to which is, that no one has ever yet satisfactorily solved the question of where the power of appointing these assessors ought to be vested. These assessors were not to vote, and the main object of their appointment was to increase the competency of the tribunal. If incompetency had been the charge made against the tribunal by the public, the appointment of assessors would probably have been the best way of removing the objection; but the charge was party spirit, and as this was not attempted to be provided against by Mr. C. *Buller's* bill, it failed to excite any warm support either in or out of the House of Commons.

The next plan was that proposed by Mr. *O'Connell* of submitting questions to be selected by a Committee of five, appointed by the Speaker, to the decision of a judge, and a special jury (4) of an adjoining county. There can be little doubt, but that many of the questions which arise in Controverted Elections, would be better decided by a jury, than in any other manner; and if the House of

(1) Bill ordered to be printed, 21st November, 1837.

(2) *Mirror of Parliament*, 1837—8, p. 74.

(3) *Ibid*, 1838, p. 3321.

(4) *Ibid*, 1837—8, pp. 74, 3311.

Commons would allow a select Committee so appointed, the discretion of sending questions for the decision of a judge and jury, it would be the noblest victory over itself that Parliament ever gained. (1) But valuable as such a provision would be, we ought not to over-estimate its importance, and it could easily be shewn that it would not afford much immediate relief, from the pressing imperfections of the present system.

The principal features of the alterations proposed by Sir R. *Peel*, were detailed by him to the House in a speech, which shows that he had paid great attention to the subject and was aware of its real difficulties. (2) The first of his suggestions is very valuable, and it can scarcely fail to be adopted if the subject is taken up in such a manner as to insure attention to it. He proposed that the House should decline all interference in preliminary questions respecting recognizances. That some one individual should be appointed, who should act under the authority of the Speaker, that the regulation of these preliminary matters should be intrusted to him, and that he should also superintend the taxation of costs. The plan which he suggested for altering the constitution of Election Committees was as follows: That the Speaker should be empowered to appoint a certain limited number of Members of the House for the management of all election proceedings; the number so selected to form a general Committee on election petitions. On this Committee he proposed to devolve the appointment of Committees for the trial of all Controverted Elections. This plan shows that the author of it had paid considerable attention to the

(1) "Nothing can be a better proof of the efficacy of the causes that produce the liberty of the English, than those victories which parliament from time to time gains over itself, and in which the members, forgetting all views of private ambition, only think of their interest as subjects."—*Note on passing of Grenville Act, De Lolme, Book, 1, c. 8.*

(2) *Mirror of Parliament*, 1838, p. 3903.

subject; but it makes no provision for the exclusion of party decisions by the Committee appointed to try the Controverted Elections, and it gives some scope for the exercise of party feelings in the formation of such Committee. The plan is founded on the supposition, that if the fittest men of the House are selected, their honour, character, and intelligence can be relied on. The mode of insuring the selection of the fittest men, is, by first giving to the Speaker the power of nominating a general Committee, and then giving to the general Committee power to select the particular Committee. In order for this plan to succeed, the Speaker must exercise perfect impartiality in nominating the general Committee; the general Committee must exercise perfect impartiality in selecting the particular Committee; and the particular Committee must exercise perfect impartiality in deciding on the law and facts presented to them. If there is a failure in any one of these three stages, it is fatal to the system. It is probable that this plan, in its present form, will scarcely be found sufficiently simple, or sufficiently directed against the specific charge of party bias to insure its adoption. But it contains many valuable suggestions, and is likely to furnish a basis for the introduction of an improved tribunal, composed of members of the House of Commons, and thus to prevent the necessity of their entirely divesting themselves of their present jurisdiction.

The only other (1) important plan is one which is about to be brought forward by Lord *Mahon*, (2) which was alluded to in 1837 by the *Attorney General* in the following observations: "I think, and I throw it out merely as a suggestion, that we might have a tribunal wholly unconnected with party or parliament; and I am certain

(1) We confine ourselves to those plans which have been suggested in the House of Commons.

(2) Votes and proceedings of the House of Commons, 5th Feb. 1839, p. 10.

that, if we had such a tribunal, the cases before Committees would be decided much more economically and expeditiously than at present." (1) Certainly, if the question be examined in the abstract, it is an anomaly at variance with the fundamental principles of a representative government that the elected should have the power, after an election, of saying who were and who were not entitled to vote as electors. If we inquire into the origin of this power, we find that it originated entirely in usurpation. (2) But it is useless now to complain that the effects of that usurpation have been unfortunate, or to call the power which has thus been acquired unconstitutional. The House of Commons at present possesses the power, and the question is, How is it to be dealt with? Few persons, probably, will doubt that "the objects of justice, uniformity, and dispatch would be better attained" (3) by a tribunal unconnected with parliament. But how can the House of Commons divest itself of the right of adjudicating on these questions without in some measure derogating from its own dignity and importance? We say without hesitation, let the House of Commons preserve its power, but exercise it with moderation. Let the subjects left to be decided upon after an election be reduced into the narrowest possible compass. Let a good system of registration be introduced, for which purpose we would humbly suggest that every claimant ought to send in his own written claim, as under the Scotch Reform Act, and that the register of every county or place returning members ought to be under the superintendence of a competent "registering officer." Let a good court of appeal be established, so that the register may, with the approbation of all parties, be made completely final. Let no objection be allowed after the election to any voter whose name is

(1) *Mirror of Parliament*, 1837, p. 1497.

(2) *Infra*, p. 225.

(3) Lord Mahon's notice of motion. *Votes and proceedings of House of Commons*, 5th Feb. 1839, p. 10.

on the register, except on account of bribery or the acceptance of a disqualifying office subsequent to registration. But we must check these suggestions, for the question of registration is totally distinct from that now under consideration.

To return to our subject, we are on the whole disposed to give our decided preference to the plan of Sir R. *Peel*, as a basis for altering the tribunal, over the others to which we have referred. But we would vary his plan in three important particulars.

1. By confining the interference of the general Committee in the formation of the particular Committee to the division of the House into panels.

2. By submitting certain classes of inquiries to the sole cognizance of the general Committee.

3. By striking at the root of party decisions.

We will proceed to consider these three points in detail. The general Committee might be appointed by the Speaker, and their interference in the appointment of Committees for the trial of election petitions might be confined to the division by them of all members qualified to serve into panels, as suggested originally by the Committee on Controverted Elections, (1) and recommended by Lord *Howick*, (2) and the panels might be assigned by lot to the several cases.

If the inquiries of the particular Committees were limited to cases of scrutiny, exclusive of bribery, and certain restrictions imposed on them to discourage mere party decisions, the particular Committees might with safety be selected by ballot from the panels formed by the general Committee. One reason for limiting the particular Committee to cases of scrutiny is, that such cases consist chiefly of details which Members chosen by ballot would be quite competent to decide, if proper measures

(1) *Mirror of Parliament*, 1838, p. 3315.

(2) *Ibid*, p. 3918.

were taken to settle two or three disputed questions. Another reason is, that whenever charges which, if established, would make an election void, are tried at the same time with a scrutiny, a very unfair advantage is given to the petitioner ; for it is found in practice that, in mixed cases of this description, if the petitioner establishes the disqualification in the first instance, he is frequently allowed to place himself in a majority on the scrutiny almost without a struggle, although the justice of the case would require that the election should only be declared void. The third and most important reason is, that no Committee selected by ballot could be expected to be competent to investigate satisfactorily charges of agency, bribery, and intimidation. All these are matters which should be reserved for the general Committee.

Suppose then, that the Committee elected by ballot, were confined to cases of scrutiny exclusive of bribery, the next consideration is, what restrictions ought to be imposed upon them to prevent party decisions ? In order to form a correct judgment on this point, it must be borne in mind, that their whole duty would be, to strike off the names of voters, who had been improperly placed on the poll, and to insert the names of voters on the poll, who had been improperly omitted. It is undoubtedly a great hardship on any man, who has been allowed to vote by those who were entrusted with the conduct of the poll, that his name should afterwards be struck off, unless the case against him is very clear indeed. If it is a case upon which men of honour and character might fairly differ in opinion, the voter ought to have the benefit of the doubt. If those members only of the Committee were to vote against his right, who were politically opposed to him, and all those were to vote in his favour, who were on his own side in politics, his name ought to remain on the poll. The composition of most Committees gives six of one party,

and five of the other, but it is very common to find seven of one party, and four of the other. As a means of giving to every voter whose name is on the poll some security against being struck off, merely on party grounds, it might reasonably be proposed that no voter's name should be struck off the poll, unless eight members of the Committee agreed in resolving that his vote was bad. (1) If a less number than eight voted against him, his vote should remain. Again, with regard to persons who had tendered their votes and been rejected, when it is considered that the trial of an election petition, after the result of the election has been determined, opens a door to great party feeling and strong interest, and that the person who tenders his vote, has already had a decision against his right, it might easily be shewn that a similar principle might fairly be extended to the cases of tendered votes. Hence it might further be proposed that no tendered vote should be added to the poll, unless eight members of the Committee agreed in resolving that the vote was good. By these means the decisions of those who have the control of the register, and the superintendence of the poll could never be capriciously overruled; whenever they were overruled, the justice of the decision of the Committee would be acknowledged by every one, and when they

(1) Where the tendency is for members to vote with their party, it is unsatisfactory to give a mere majority the power of disfranchising; and to require unanimity would be to interpose too great an obstruction to the right of appeal. Of course in questions of evidence and practice the decision would be still left with the majority, unless assessors were appointed. There would be many advantages in assessors; to obviate the objections, each Committee might be permitted by a resolution of eight of its members, to call in any person as assessor whom they pleased, whether he were a member of the House or not. If he were a member, he should not be paid, and his decision should be binding in all cases which were referred to him by a resolution of eight members. If he were not a member, he should be paid—he should not be allowed to decide or interfere in any thing except questions of evidence and practice, all of which questions should be left entirely to his decision, which decision should be binding.

were upheld, the presumption would be, that the case, to say the least, was doubtful.

In order to prevent any collision of jurisdiction, no petition for a scrutiny should be referred to a select Committee, whilst an inquiry was pending, with reference to the same seat, before the general Committee. But after the general Committee had come to their decision, a reasonable time might be allowed for enabling a petitioner to proceed with any petition for a scrutiny, which had been presented in proper time, according to the present regulations ; and facilities might be given to electors, to come in and oppose such petition.

A difficulty has always been felt by those who have turned their attention to this subject, in finding a suitable substitute for the present mode of striking. If the House were divided into panels, each of the litigant parties might be allowed a right to strike off a limited number from the panel allotted to his case before the commencement of the ballot, without assigning any cause. If a party wished to strike off more than the prescribed number, he might be obliged to assign cause on affidavit against all whom he objected to, and the decision as to the sufficiency of such cause might be left to the person who was intrusted with the regulation of recognizances. Whenever there were more than two litigant parties, no name should be struck off except on cause shewn by affidavit.

The duties of the general Committee would be principally the trial of questions of want of qualification, intimidation, and bribery. Cases coming under the first of these heads, have been so simplified by 1 & 2 Vict. c. 48, that they will in future present little difficulty. Those which come under the other heads only require to be treated with judgment, moderation, and uniformity. It would probably be thought right to enact that a bare majority should not be sufficient to deprive a member of his seat ; but all

the details as to the best mode of conducting these inquiries would be best left to the Committee itself. It would be easy for this Committee to lay down such regulations for the conduct of the cases brought before them as would go far to insure confidence in their proceedings. The Committee might have the power of instituting an inquiry on the spot, by sending down a commissioner in cases of intimidation and bribery; and in cases of bribery, might be allowed to direct one or more issues to be tried by a jury. The most satisfactory results might be anticipated from having all questions of disqualification, intimidation, and bribery, referred to the same Committee.

This plan is not founded on a hasty consideration of the subject, but is the result of a long course of patient and attentive observation, carried on under circumstances peculiarly calculated to lead to a right conclusion. It is not based upon theory, but every suggestion in it has been framed to meet some practical evil, which so repeatedly obtruded itself, that it could not be overlooked. We fear that no change less extensive than that here suggested would be likely to obtain the permanent confidence of the public. If, however, the alterations here proposed should be thought too considerable to be brought forward at once, we incline to think that the mere enactment that no name should be erased from the poll, or added to the poll by a less number of votes than eight, would be such a proof of a resolution to discountenance party decisions, as would go a long way to efface the injurious impression which has been made on the public. If, in addition to this, the division into panels were adopted, and the House were to give up all interference in preliminary questions respecting recognizances, the improvements and alterations which would necessarily follow from such a commencement, would soon cause the present complaints respecting the trial of Controverted Elections to cease. The broad grounds on which it is proposed to take

the absolute control over the result out of the hands of the mere numerical majority, are—That it would introduce greater moderation into the proceedings of Committees. That it would make it the interest of all parties to settle disputed points of election law. And, that whilst any point remained unsettled, the benefit of the doubt would always be given in favour of the franchise.

We have avoided, as much as possible, all allusion to many obvious alterations which might be made in minute details, and mere matters of practice, (1) in settling questions of election law, (2) and in the system of registration. There are a variety of improvements in these subjects, which might easily be introduced, and would tend greatly to facilitate the execution of the duties, and lessen the trouble, to which members of Election Committees are liable. We would willingly have entered fully into these matters, but the object of this introduction is to shew how the tribunal for trying Controverted Elections may be re-

(1) The difficulty of obtaining the costs of a petition which has been voted frivolous and vexatious are such as to render the vote almost nugatory. The cases of *Braynes v. Halcomb*, 3 Ad. & El. 381; *Ranson v. Dundas*, 3 Bingh. N. C. 566, and *Fector v. Beacon*, not yet reported, shew the intricacy of the law on the subject. Another thing urgently requiring remedy is the practice of sending in lists of hundreds of objected voters with twenty or thirty objections against each vote, in cases in which there are not twenty objections which can be supported in the whole list.

(2) The following is one of a vast number of instances of the insecurity of the franchise under the present system. It has been decided in the *Bedfordshire case*, 2 Luders, 542, and in the *Middlesex case*, 2 Peck. 116, that collectors of window duties are not disqualified. At the time of those decisions such collectors were appointed by the land-tax commissioners, and it was held, that they came under the exemption in 22 G. III. c. 41, s. 2. A few months after the decisions in Peckwell, statute 43 G. III. c. 99 and c. 161, came into effect which vested these appointments in the assessed-tax commissioners. At the revision of 1837, window-tax collectors were objected to on the ground that the statute on which the decisions in Luders and Peckwell turned was no longer applicable, but the votes were held good. At the revision of 1838, window-tax collectors in the same county were objected to on the same ground, and their votes held bad. The only mode of preventing this insecurity of the franchise is to establish an efficient Court of Appeal.

lieved from the charge of party spirit, and any digression into other subjects, however important, must necessarily have interfered with this object. We shall consider that our time and exertions have been well employed, if the present work should be found materially to contribute to remove any imperfections which may have heretofore tended to disparage the House of Commons in public estimation. The success which crowned the exertions of Mr. Grenville may well animate and encourage those who are now seeking to carry on the work which he so nobly begun. In his day the administration of election law was incomparably more defective than anything which has been witnessed in more modern times. The abuses had grown intolerable, yet he succeeded in removing them, and established in their stead a tribunal which has existed during the greater part of a century, and which for upwards of half that period gave universal satisfaction. Can it be wondered at that he should have earned for himself the gratitude of his cotemporaries and the admiration of posterity? Instead of being disheartened at the discovery of defects which time has engrafted on a system so auspiciously commenced, it becomes us resolutely to detect and remove them. May those who embark in this laudable undertaking aim at permanent improvement rather than momentary applause; may they take no step to compromise the dignity and importance of the House of Commons, and above all may they be deeply impressed with the belief, that the best security for its privileges and its powers consists in the possession of the moral influence of character and of the respect and confidence of the people.

10, *Crown Office Row, Temple,*

14 Feb. 1839.

A TABLE

OF

THE PRINCIPAL DECISIONS

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OF THE

COUNTY OF CARLOW.

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COUNTY OF CARLOW.

The Committee was chosen (1) on Tuesday the 25th of April, 1837, and consisted of the following Members :

Francis Thornhill Baring, Esq. (Chairman) *Portsmouth.*

Thomas Thornely, Esq.

Wolverhampton.

The Hon. Lieut.-Col. Pierce Butler,

Kilkenny County.

Richard Walker, Esq.

Bury.

Henry Wilson, Esq.

West Suffolk.

Thomas Balfour, Esq.

Orkney.

Thomas Martin, Esq.

Galway County.

Capt. Henry Geo. Boldero,

Chippenham.

The Hon. Rich. Bootle Wilbraham,

South Lancashire.

Philip Henry Howard, Esq.

Carlisle.

Rear Admiral Sir Charles Adam,

Clackmanan and Kinrosshire.

Petitioners—Electors in the interest of Thomas Bunbury, Esq.

Sitting Member—Nicholas Aylward Vigors, Esq.

Counsel for the Petitioners—Mr. Thesiger & Mr. Austin.

Agent—Mr. Alexander Bate.

Counsel for Parties admitted to defend, and for Returning Officer—

Mr. Maule & Mr. Rushton.

Agents—Mr. Baker and Mr. Fitzgerald.

THE petition was by electors in the interest of Mr. Bunbury.

It contained allegations of bribery and intimidation, and of improper conduct on the part of the Catholic

(1) Before the Committee was balloted for, an application was made on behalf of the sheriff, for him to be allowed to join in striking off from the list of members drawn by lot. A report of the arguments of the counsel and the decision of the House of Commons on this question, will be found in an Appendix to this case, for which we are indebted to Mr. Rushton. See Appendix, p. 83.

1837. Clergy which were not gone into. There were also charges against the sheriff of having appointed as assessor, a member of "The General Association of Ireland;" of having allowed persons to poll for Mr. Vigors, whose votes had been struck off the register by order of the Speaker of the House of Commons, others who had no sufficient qualification, others who had parted with their qualification, others whose names were not on the register; and of having struck off one of Mr. Bunbury's votes from the poll after it was closed.

It prayed that the election and return of Mr. Vigors might be null and void, and that Mr. Bunbury might be declared to have been elected, or that the parties might be sent to a new election; and that the register might be amended by striking off all persons unduly or improperly registered. The petition also prayed that steps might be taken to restrain the sheriff from making an undue return at any future election.

At the close of the poll the numbers were—

for Mr. Vigors . . 669

for Mr. Bunbury . 633

The petitioners proceeded by way of scrutiny to strike a sufficient number of votes off the poll to destroy the sitting member's majority of 36.

JOHN ALLEN'S CASE.

Mr. *Thesiger* proposed to strike off the vote of John Allen, whose name was included in List No. 8, of which the heading was as follows: "List, containing the names of 16 persons, who, upon the trial of the last petition complaining of an undue election and return for the county of Carlow, were objected to as not being entitled to vote, and whose votes were determined by

the Committee assembled to try that petition to be had **1837.**
 votes, and whose names were duly removed from the register, in obedience to the warrant of the Speaker, but who afterwards voted at the said election for the said Nicholas Aylward Vigors, having been again registered upon the same qualification which had been adjudged to be bad by the said Committee." He produced two affidavits of the said John Allen, the first dated in 1832, on which was indorsed the following memorandum, "struck out of register by order of Committee;" the second, dated the 22nd June, 1836: he also produced the poll-books of both elections, from which it appeared, that John Allen had on both occasions voted for Mr. Vigors; and the following minute in the poll-book of the last election, opposite to John Allen's name, "both oaths put, objected, vote allowed." He also stated, that he was prepared to prove, that John Allen was the person whose vote had been struck off from the register at the trial of the last petition, and that he had not since changed or altered his qualification.

Mr. *Maule* asked if the ground of going into this case was, that John Allen was not duly registered, either in 1832 or in 1836?

Mr. *Thesiger* answered in the affirmative.

Mr. *Maule* then objected to the case being gone into, on the ground that the vote had been placed on the register of 1836 by the assistant barrister, upwards of six months before the present election. and that no Committee of the House of Commons sitting under the Grenville Acts, has authority or jurisdiction to sit in appeal upon the decision of the assistant barrister, or to try the merits of his registration.

The Committee refused to enter into an examination of a voter's qualification, where his name stood on the register.

He cited the first Carlow case, (1) and the two cases

(1) C. and R. 439. P. and K. 395.

1837. of Ennis and Youghal, not yet reported, as decisions in his favour. He admitted that it was a question on which there were conflicting decisions; but all the decisions placed some limit to the extent to which it was competent to Committees to open the register, yet scarcely any two Committees who had opened the register had agreed upon the same limit. He relied both on the words and the spirit of the English and Irish Reform Acts, to show that no such power was conferred by them on Committees sitting upon Irish controverted elections. And if this position were conceded to him, he anticipated little difficulty in giving a complete answer to any arguments in favor of such a power which might be attempted to be drawn from other sources. He also referred to the decisions in English (1) and Scotch (2) election petitions, subsequent to the Reform Acts, in which it had been recognised as an established principle, that whatever powers of inquiring into the qualification of voters Committees of the House of Commons might have had before the passing of the English and Scotch Reform Acts, they had since been restricted in their inquiries to precisely those limits which are, either in express terms or by necessary implication, imposed by those Statutes.

The enactments on which he intended to rely, were those of the Irish Reform Act, 2 and 3 Wm. IV. c. 88, which he should compare with those of the English Act; and whilst he did so, he wished it to be borne in mind, that the Irish Act was passed after the English, and must be looked on as having purposely corrected some imperfections which had been discovered in the English Act. The statute 2 and 3 Wm. IV. c. 88, begins with a recital, That it is expedient to extend the

(1) See the Oxford case, C. and R. 153. P. and K. 58.

(2) See the Linlithgow case, C. and R. 352. P. and K. 280.

elective franchise in Ireland; and by sections 1 and 2 1837.
a new franchise is given to certain leaseholders and
copyholders; by section 3, the old franchise is con-
tinued; by section 13, it is provided, that no unregistered
person shall vote. The several sections, from the 14th
to the 26th inclusive, contain provisions for the first
registration of voters after the passing of the Act: those
provisions are very elaborate, and show that great con-
sideration was bestowed on them, and great pains
taken to make the system of registration as complete
as possible. Thirty days notice was required to be
given of the time and place of registration, which was
to be held at a special session before the assistant bar-
rister; every person intending to apply to be registered
was required to transmit to the clerk of the peace
twenty days notice of his intention, with a full descrip-
tion of himself and his alleged qualification; and the
clerk of the peace was bound, ten days before the time
fixed for registration, to publish and circulate through
the county, alphabetical lists of the names and descrip-
tions of persons applying to be registered. At the regis-
tration, the names of the persons contained in that list
were to be called over in alphabetical order; each ap-
plicant was obliged to appear, and produce in open
court, the lease or deed under which he claimed, and
make out his qualification; and ample provision was
made for the inspection of deeds, and full inquiry into
each voter's claim. If the voter was able to pass
through this investigation, and his claim was allowed,
he was required to make an affidavit set out in schedule
(C) of the Statute, which was to be signed by the assist-
ant barrister, and by him delivered to the clerk of the
peace, to be filed of record. If the claim was disal-
lowed, the assistant barrister was required to make an
order to that effect, specifying his objection; but such

1837. order was to be without prejudice to any subsequent application by the same claimant.

If any claimant felt aggrieved by the rejection of his claim, he might, if the rejection had been on the ground of insufficient value, appeal to the judges of assize, and have the question tried by a judge and jury; or, if the order of rejection stated any other ground, the claimant might have such order reviewed by the judges of assize; and in either case, if the decision on appeal were in favor of the voter, such decision had the same force as that of the assistant barrister. Section 27 provides, that all registrations subsequent to the first should be held at the general quarter sessions of the peace before the assistant barrister, or chairman, and extends all the provisions applicable to the first registration to those which should subsequently be held at the general quarter sessions. Section 28 provides for the delivery of certificates of registry to each registered voter, which shall be the proper evidence of the right to vote. By section 32, no registry is to be valid, unless made under the provisions of that Act. By section 39, the refusal to give evidence on the investigation of a claim to register, is punishable by fine not exceeding £10. By section 40, forgers of certificates, orders, or affidavits, are punishable by transportation. By section 42, a false oath is made perjury. By section 45, the assistant barrister is authorized to fine the clerk of the peace, and others, for neglect of duty, and to fine, or commit to prison, for contempt of court. By section 54, the certificate, or (in default of its production) the original affidavit, is made conclusive of the right of voting of the party named therein; and no inquiry whatever is permitted as to the right of voting, nor any scrutiny allowed. But the returning officer, if required, is to administer the oath in schedule (B) to the voter.

Section 59 subjects any person who should vote whilst he was disqualified, by the holding an office or otherwise, or after he has ceased to be qualified, to a penalty of £100; and in case of a petition to the House of Commons authorizes the Committee to strike off his vote, and order him to pay such costs to the petitioner as they may think proper. This is the only express power of striking off by a Committee contained in the whole Act; and it applies, not to striking off the name from the register, but the vote from the poll. By section 63, no clergyman is to be permitted to vote, unless his name is registered as a freeholder, although, under the previous law, beneficed clergymen were not required to register. The Act contains no provision for a registry book similar to the 54th section of the English Reform Act, but, by sections 19 and 20, the register consists of the affidavits, filed and kept among the records by the clerk of the peace, in which the assistant barrister, or chairman, has by his signature declared and adjudged the deponent to be entitled to be registered.

Such is the system of registration introduced by the Irish Reform Act. Its main object appears to have been to make all votes the subject of judicial inquiry and decision before registration, and to make such decision final. For if the decision was not intended to be final, it is difficult to account for the introduction of such extensive apparatus of inquiry. But the intention of making the registry final, is not left to be collected by conjecture from a comparison of the various sections of the Act, for it is conclusively established by the omission of any express provision for opening it. On this point, the conclusion which follows from the comparison of the English and Irish Reform Acts is perfectly irresistible. By the English Reform Act, 2 Wm. IV. c. 45, s. 60, a Committee of the House of Commons are

1837. expressly authorized to question the correctness of the register made by the English revising barrister, and to alter the poll accordingly; and on their making their report to the House of Commons, the House may order the register to be corrected. In the Irish Reform Act, passed after the English, no such power is given, either to the Committee or to the House of Commons. This omission could not have happened, if there had been any intention to give to Committees the same power over the Irish register as they have over the English.

It may be asked, why this difference should have been intentionally made between the English and the Irish register? Nor will it be difficult to find numerous and substantial reasons which might have led to the substitution of a different appeal in the case of Irish votes, from that which had been adopted in the English Reform Act.

In the first place it must be perfectly obvious, that, whether the appeal in the case of disputed votes be to the House of Commons, or to any other tribunal, it is of great importance that the final decision should be made before the voter has polled. Before the voter has polled, the political opinions of those who had to decide on his right would be less likely to influence their decision. But when the voter has once irrevocably polled, when the exact value of his vote is ascertained, when, possibly, on the continuance, or erasure, of his single name from the poll, the success or the failure of a candidate may depend, the temptation to give way to party bias is necessarily much increased. It is to be hoped, nay more, it may readily be granted, that no member of the House of Commons would, even under these circumstances, knowingly violate the judicial oath to serve party purposes. His mind, however, might be unconsciously influenced by his wishes

in deciding questions where the facts were doubtful or the law obscure. And it must be admitted that, by making the register final before the election commences, the temptation to partiality is much diminished, and the necessity for petitions in great measure avoided. The great expense also of investigations before Committees of the House of Commons may have been another reason for leaving out this power of reviewing the register in the Irish Act. Such a power in all cases, when it is exercised, requires the attendance of numerous witnesses, who, in Irish cases, must always come from a great distance. Some idea may be formed of the weight of this argument, by reference to the petition now under investigation: when it was stated, that nine lists of voters objected to had been handed in by the petitioners, of which, the second alone contained 193 names, all objected to, on the ground of under-value, each of which must be separately inquired into, if the register was opened, and the inquiry would be of that lengthened nature, that in many instances a single vote must be expected to occupy the greater part of a day. Nor was this all; for it might be the lot of any voter who might come forward to support his vote, that he might be detained with his witnesses in daily attendance at the door of that Committee-room, and in daily expectation of having his case brought forward, from the commencement of its sittings to the termination. And the only conclusion of all his pains, and labor, and expense, might be for him to be told, that he was disfranchised, without the possibility of appeal, and without any reason having been assigned, or any word of explanation given, from which he might collect, whether the decision had been dictated by law and principle, or by caprice. Might not these considerations, and the experience of the practical working of the jurisdiction

1837. given to Committees by the Grenville Acts, have suggested to the Legislature a doubt, whether decisions of Committees on points of law were so necessarily and uniformly superior to what might be expected from judges of assize, or their decisions on matters of fact so preferable to those of a jury, as to compensate for all the additional inconvenience and expense attendant on their inquiries; and for leaving a register, framed for the purpose of facilitating elections, in every case incomplete, till after those elections were closed?

But, not to speculate further on what might have been the motives which induced the Legislature to make an Irish register final after the English had been made liable to be revised by a Committee, he would proceed at once to show, by a comparison of the two Acts, that, from whatever motive and with whatever view, the Irish Act did in fact make the judgments of which the register consisted conclusive on the Committee.

In the first place, he would contrast the tribunals under which the registration was to be effected in England and Ireland. In England, the revision is intrusted to a barrister of any standing whatever, who is appointed for the purpose by one of the judges: he has, as such barrister, no other judicial functions intrusted to him, and is often a young man of little practice, and it is almost impossible that he should have had the least judicial experience. The appointment of the English revising barrister is only annual: he cannot be attended by counsel, (2 Wm. IV. c. 45, s. 52,) nor can he fine for neglect of duty, or refusal to give evidence, nor imprison for contempt of court. His power of inquiry is limited to cases in which the vote is objected to; if unobjected to, he is bound, without inquiry, to place it on the register. There is no provision that his register shall be conclusive; on the contrary, any person whom

he has rejected may tender his vote at the poll, (2 Wm. IV. c. 45, s. 59,) and all his decisions are expressly subjected to an inquiry by the House of Commons, by section 60, which is the only mode in which their correctness can be questioned, and his register is in force only for a single year. 1837.

The Irish assistant barrister differs from the revising barrister in England in all these particulars. They differ in the mode of their appointment, the tenure of their office, the extent of their powers, the importance of their functions, and the nature of the appeal which lies against their decisions.

The Irish assistant barrister presides in the court of quarter sessions, a tribunal in which the Legislature reposes high confidence, and to which it intrusts the decision of questions of the greatest civil and criminal importance. He is incapable of removal, his tenure being like that of the judges themselves. He is invariably attended by counsel. He has ample powers of fining and imprisonment, to enable him to conduct his inquiries with effect. He is bound to inquire fully and upon oath into every vote, whether disputed or not; and no voter can be improperly put on the list, without perjury or forgery. If he decides in favor of a vote, he is required to give to the voter a certificate, which, by an express provision of the Act, is made conclusive of the right to vote. "If he decides against a vote, any voter feeling aggrieved by his decision may appeal from it to a judge and jury, if the question be one of fact; to the judges of assize, if of law.

But there is no provision, either express or implied, from which a Committee of the House of Commons can claim any authority to impeach his register; nor is there, in point of fact, any original book of registration to which such a power would be applicable.

1837. There is, also, another strong argument against the House of Commons having any power to interfere with the Irish register, to be drawn from the nature of the appeal which the Irish Act provides. For if a Committee have power to review the decisions of the assistant barrister, they must also have power to review the decisions of the judges of assize on appeal. And, although a provision in any statute appointing Committees of the House of Commons to sit in judgment, for the purpose of reviewing decisions of the judges of assize on matters of law, would be a singular anomaly, yet, if such an enactment existed, it must, of course, be carried into effect. But it would be something more than anomalous, to extract such a provision by implication from a statute which did not contain a single syllable on which such implication could be supported; especially as, if the power were to be raised by implication, there could be no possible way of defining its limits, or the mode in which it was to be exercised.

When the Irish Reform Act gives an appeal from the assistant barrister to a judge, if the vote be rejected, it goes on to enact, that the decision of the judge shall have the same effect as the decision of the assistant barrister. And when a judge reverses a decision, the machinery is provided for enabling the judge to give the voter his certificate. Surely, if it had been intended that the House of Commons should be a court of appeal from the assistant barrister and judge, similar machinery would have been provided for enabling the House of Commons to give effect to their decision, and take away the certificate of the voter thus disfranchised. By section 60 of the English Act, the power of questioning the correctness of the register is expressly given to the House, and appropriate machinery is provided, to enable the House to set right the errors in the

register. Can it then be believed, that the framers of the Irish Reform Act, with section 60 of the English Act before them, intended, by implication, to confer such powers as those contended for? If the register was intended to be final, the whole of the Irish Reform Act becomes consistent and intelligible; but if it was not intended to be final, it appears impossible to assign any adequate reason why no express provision was made for opening it. If, indeed, there were no other argument against opening the Irish register than the existence of the clause in the English Act giving to Committees the power of questioning the register, and the omission of it in the Irish Act; the circumstance of the Irish Act having been passed shortly after the English, and in *pari materia*, would be conclusive of the question. And, when to this was added the provision in the 59th section of the Irish Act, authorizing a Committee of the House of Commons to strike a name off the poll, under certain circumstances, and that, in the 54th, making the certificate, or affidavit, conclusive of the right of voting, the argument against giving by implication to a Committee the power of striking names off the poll of an Irish election, on the ground of their having been improperly registered, became doubly strong.

But it may be contended, that the House of Commons has the power, independently of any Act of Parliament; and that section 60 of the English Act is only cumulative.

The simple answer to such an argument is, that the insertion of that section is conclusive as to the power of the House.

And, a very slight consideration of the subject would be sufficient to show, that it is almost an absurdity in terms, to contend that there is any common law power in the House of Commons to determine who

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1837. shall, or who shall not vote at a particular election. The interests of the members of the House of Commons may, in some measure and in some cases, be directly opposed to the interests of particular classes of voters, which reason is alone sufficient to prevent the elected from having any common law right to determine who shall be the electors; when such right is to be conferred, or taken away, or modified, it can be done only, as it always has been, by an Act of the whole Legislature.

But it may be urged, that before the passing of the Irish Reform Act, the House of Commons had to a certain extent the power of questioning the right of voters to be placed on the poll; and that, as nothing is contained in that Act expressly taking away that power, it must be considered to continue. In order to explain this satisfactorily, it would be necessary to inquire accurately into what is and what has been the authority of the House of Commons on this subject.

Before the Grenville Acts, the House of Commons had by common law an authority to investigate the due execution of writs issued to returning officers for the return of members to that House. At that time, it was the duty of the returning officer to inquire into the right of persons who tendered themselves to vote, and to return the person who had the suffrages of the greater number of qualified voters. The returning officer was liable to the House for any abuse of the authority reposed in him, and if his conduct was impugned, the House of Commons were authorized to investigate it, and for that purpose to scrutinize the list of persons whom he had permitted to vote, and whom he had excluded. Thus the inquiry into the qualification of voters became necessary, as part of the inquiry into the mode in which the sheriff had done his duty.

This power was vested in Committees by the Grenville Acts. 1837.

But the jurisdiction of the House of Commons, and subsequently of Committees, was always limited to the extent of the returning officer's jurisdiction.

A Committee of the House of Commons is the tribunal to which an appeal lies against the conduct of the returning officer; and the same rule is applicable to its jurisdiction which holds good in all other cases of appeal, viz. that the court of appeal may inquire into anything which the inferior court may have inquired into, and nothing further. The court of appeal may use more extensive means of inquiry than the inferior court had within its power, but cannot try any question which it was not competent for the inferior court to have tried.

Before any system of registration was introduced into Ireland, the returning officer in Ireland inquired into the whole of the qualification of the voters, so might the House of Commons on appeal. When by the Reform Act the returning officer was confined in his inquiries to what took place subsequently to the registration, the House of Commons was also confined in its review of the conduct of the returning officer to what took place subsequently to the registration.

The inherent power of the House of Commons extends only to an inquiry, whether any thing has been done by the returning officer, the voter, or the candidates, which ought not to have been done, supposing them to have had full information of what their duty was.

The House of Commons has power to inquire if a voter has accepted a bribe; that is a contempt of the House of Commons.

If a candidate has used intimidation.

If a returning officer has neglected his duty or been imposed upon. Thus, although the returning officer is restricted to requiring the oath in schedule (B) to be

1837. taken, the Committee have a power to examine into the correctness of the averments in that oath; and by section 59, they are authorized to punish a false oath. The Committee may inquire, whether any thing has occurred since the registry to disqualify the voter. They may sit in appeal on the decisions of the returning officer, and in prosecuting their inquiry may use the most ample means of investigation, but they cannot sit in appeal on the decisions of the assistant barrister, unless the power of doing so is expressly given to them by Act of Parliament.

The subjects of inquiry before Committees and before the returning officer would be found to be the same, though the modes of inquiry might be different; the returning officer's means of inquiry being restricted by the Reform Acts to the questions and oaths prescribed by them. There was one exception to this rule; the returning officer had no power of inquiring whether a voter had become disqualified by accepting an office; the Committee had: but as this power was conferred by express enactment (in sec. 59), it showed the existence of the rule in other cases.

Such, he believed, would be found to be the true and constitutional privileges of the House of Commons in matters of election. But let it be granted, for the purposes of argument, that the view which he had taken of the ancient, immemorial, natural, and undoubted privileges (1) of the House of Commons was too narrow; let it be granted that the privileges of the House of Commons were paramount to any Statute, although that statute was originated by themselves. Let it be granted, that in matters of election they were not "bound to judge according to the law of the land, and the known and established laws and customs of Parliament," (1)

(1) See the authorities cited by Mr. Harrison, in his argument on the Oxford case, P. and K. 79.

Let every thing be granted which the wildest declaimer for their privileges ever contended for, still the grounds on which the present vote was objected to could not be sustained. They were called on to strike John Allen's vote off the poll, because a previous Committee had ordered his name to be struck off the register. The register was a thing of yesterday. What prescriptive right could the House of Commons claim to control it? To have been the subject of their ancient and immemorial usages, it must have been ancient and immemorial itself.

If this principle be conceded, the objection to John Allen's vote cannot be sustained.

For although the resolution of June 1835 authorizes the House of Commons to direct a Speaker's warrant to be issued requiring the clerk of the peace to amend the register, yet this resolution is only founded on section 60 of the English Reform Act, and is wholly inapplicable to Ireland, if the House of Commons has no power to interfere in any way whatever with the Irish register.

Consequently, the warrant of the Speaker of the House of Commons for striking off the name from the register was a nullity, for want of jurisdiction; and John Allen's first certificate still remained good.

Even if that was not conceded, the second certificate at least was good, unless the register could be opened.

And even if the register were opened, they would still be bound to hold the vote good, until having inquired into the evidence on both sides for themselves, without any reference to the opinions of any previous Committee, they themselves should adjudicate it to be bad.

Mr. Thesiger.—The question of opening the Irish register is not new. There has scarcely been a contro-

1837. **verted election since the passing of the Irish Reform Act in which it has not been amply discussed. Probably there never was any question brought before any tribunal, which has been more thoroughly argued and considered. And the result has been, so strong and general an impression in favor of the reasonableness and legality, and even necessity, of opening the register in Ireland, that although the decisions are not strictly uniform, yet the great and overwhelming current of cases is decidedly in favor of preserving to Committees of this House their ancient and constitutional authority. The only reported case cited on the other side, is the first Carlow county, in which the reported decision of the Committee is given as follows:—"The Chairman stated, that after the most anxious deliberation, the Committee were of opinion, that they ought not to enter into the qualification of the voter." (1)**

The very form in which this decision is given, shows strongly the doubt and hesitation with which the Committee arrived at their conclusion, and that they were well aware of the difficulties and inconveniences which must arise, if the view which they took of the question were to be generally adopted. Two other cases have also been cited, those of Youghal and Ennis; but as neither of those cases is reported, it is impossible to estimate the weight to be attached to them, or the extent to which they go. But from his own recollections of the Ennis case, he could safely assert, that so far as it bore upon the question at all, it was decided upon grounds directly contradictory to the reasonings which had been adduced on the other side.

But he might well afford to give to his opponent the full benefit which could be made of the three decisions which he had quoted, without giving himself the trouble

(1) C. and R. 439. P. and K. 593.

of scrutinizing or disparaging them. For he should adduce eight decisions in favor of the power for which he contended, seven of them already reported. Those cases were the Longford, (1) Galway Town, (2) Galway County, (3) Coleraine, (4) Clonmell, (5) Monaghan, (6) Cork City; (7) and lastly, the second Carlow case, in which the Committee not only opened the register, but struck off, both from the poll and from the register, the very vote whose qualification they were then discussing. 1837.

He might also add, the authority of the Longford Committee, which was at that moment sitting in an adjoining committee-room.

In considering the case of John Allen's vote, it was not at all necessary to introduce any question as to the regularity or irregularity of the mode in which the name had been struck off the register, that question would be presented to them at a future stage of the inquiry, in reference to a separate class of voters; but in the present case, if they decided that they had any power to open the register at all, there would be no necessity for resting the disqualification of John Allen, on the fact of his having been struck off by a former Committee, as the petitioners were prepared with ample evidence to satisfy the present Committee that John Allen had no qualification.

A long and detailed examination into various provisions of the Irish Reform Act had been presented to them, and a great deal of elaborate and intricate reasoning had been founded upon that examination. He should not again go over those details, nor follow out those reasonings.

He would rather commence the argument, by which

- (1) C. and R. 235. P. and K. 674. (2) C. and R. 398. P. and K. 302.
 (3) C. and R. 463. P. and K. 511. (4) C. and R. 502. P. and K. 503.
 (5) C. and R. 454. P. and K. 420. (6) K. and O. 32. (7) K. & O. 274.

1837. he proposed to justify the decisions which he had cited, with a proposition admitted as indisputable on all sides, viz., that before, and up to the passing of the Irish Reform Act, Committees of the House of Commons had full power to inquire into the qualification of voters, and that there was no express provision in that Act to deprive them of such power. By commencing from this point, he should reduce the question in dispute to a very narrow compass, and avoid all useless and irrelevant argument. It might indeed be fairly contended, that the very proposition with which he set out admitted every thing that was required to entitle him to the conclusion to which he sought to arrive. But it was contended on the other side that, although the Irish Reform Act did not in express terms take away the power of Committees to inquire into the qualification of voters, yet that its provisions were inconsistent with the continuance of the exercise of that power, and consequently, that the Irish Reform Act took away the power by necessary implication. Now, he scarcely knew how far he was justified in conceding as a point of constitutional law, even for the purpose of argument, that the House of Commons was absolutely and unconditionally obliged to abandon any or all of its privileges, however important, however ancient, and however undoubted, simply because such privileges were imagined to be inconsistent with some hasty clause of an Act of Parliament, which, by inadvertence or accident, may have found its way into the statute book. But if this were conceded, still it would lie on his opponent to make out a clear and indisputable case of inconsistency, before he could call on that Committee to strip themselves of a power which they were admitted to possess, unless the Irish Reform Act had deprived them of it.

As yet his opponent had made out no such case, he could scarcely be said to have made any attempt to do so. Almost the only grounds on which he had endeavoured to establish such a necessary implication were, by a reference to section 59 of the Irish Reform Act, and to the proceedings of Committees on English and Scotch election petitions since the passing of the Reform Acts. The argument deduced from section 59 was as follows:—that since by that section power is given to the Committee to strike off a vote under one particular set of circumstances, it must be presumed that the exercise of a similar power was not intended to be permitted under any other circumstances. Presumptive arguments of this kind are at all times weak; but on reading the section in question, the presumption arising from the use of the words, “his vote shall be struck off by the Committee,” would be found to be so trifling as scarcely to be worth a serious refutation. The object of the section in question was to prevent persons whose names were on the register from voting whilst they were disqualified, or after they had parted with their qualification; and it enables a Committee of the House of Commons to punish any person who does so. The provision which gives the Committee this power, is as follows:—“his vote shall be struck off by the Committee, with such costs as shall to them seem meet, to be paid by him to the petitioner.” Now, although this clause is loosely worded, and does not even state whether the vote is to be struck off from the poll or the register, yet it is so far from authorizing the conclusion that a Committee can only derive its power of striking off names from the express provisions of the Act, that it is quite evident, that nothing more was contemplated by it, than to give to a Committee the power of awarding costs against the person who has

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1837. improperly voted, at the same time that they strike off his vote.

With regard to the reference to the English and Scotch election petitions, he should be enabled to show, that the argument drawn from them was not applicable. In England and Scotland, the systems of registration, introduced by the Reform Acts, were entirely new; and it might well be considered desirable, expressly to subject those registers to the control of the House of Commons, in order to prevent misapprehension. But in Ireland, there was nothing new in the system of registration; almost the same system and machinery of registration existed before the passing of the Reform Act as was in force under that Act; and notwithstanding that system, the House of Commons had the undisputed power of opening the register. There was, consequently, no necessity for expressly subjecting the Irish register to the control of the House of Commons, in an Act which only provided for the continuation of a system of registration already in force, and already subject to the control of the House. The statute in force, for the registration of voters in Ireland, previous to the passing the Irish Reform Act, was 10 Geo. IV. c. 8; and it is remarkable, that almost all the provisions which have been insisted on as so important, and giving the distinguishing character to the system of registration under the Irish Reform Act, were embodied in that Statute. There was the same provision for holding the first registration after the passing of the Act, at a special sessions, before the assistant barrister of the county; a similar notice, of 30 days, to be given by the claimants to the clerk of the peace; a similar publication of lists of claimants; the same production of title deeds in open court; and similar provision for investigation by the assistant

barrister. In case of the decision being in favor of 1837.
the vote, there is a similar provision for a certificate to
be given to the voter, which is to be conclusive evidence
that the person tendering his vote or offering to poll,
has registered his freehold, and for an affidavit to be
filed of record. In case of the decision being against
the vote, there are similar provisions, requiring the
assistant barrister to set forth his objection on his
order, and preventing the voter from being prejudiced
in a subsequent application by such order. A similar
appeal to a jury, if the objection were to the sufficiency
of the value; to a judge, if the objection were on any
other ground. Similar machinery, for giving effect to
the decision of a judge or jury. Similar provisions,
for holding all registrations, subsequent to the first,
before the assistant barrister at quarter sessions.

This comparison of the system of registration, before and after passing of the Reform Act, shows that no material alteration was introduced by the Reform Act into the machinery and apparatus for registration.

And if it be admitted, that the power of inquiry of Committees was not affected by the former system, this furnishes a strong argument against its having been affected by the latter.

Great stress has been laid on the use of the word "conclusive," in section 54 of the Irish Reform Act, as applied to the certificate of registration. But, even this word is not new in the enactments respecting Irish registration. By 35 Geo. III. Ir. c. 29, s. 63, an oath is to be taken previously to voting, which, it is declared, "shall be final and conclusive evidence to the returning officer, that the person taking the said oath is qualified to vote at such election; and no such voter shall be liable to any further scrutiny or examination whatsoever before such returning officer." By 60 Geo. III.

1837. and 1 Geo. IV. c. 11, s. 10, the certificate is declared to be conclusive evidence, that the person tendering his vote, or offering to poll, had registered his freehold. 4 Geo. IV. c. 55, s. 49, re-enacts the same provision. 10 Geo. IV. c. 8, s. 9, enacts, that the certificate of registry, given by the assistant barrister, "shall stand in the place of, and be of equal effect and authority, as the certificate of registry now by law required."

These enactments only had reference to what was to take place at the poll: they made the certificate conclusive at the poll, of the fact of registry, but did not preclude an inquiry into the party's right to vote. The Irish Reform Act carries these provisions somewhat further; it makes the certificate conclusive, not only of the fact of registry, but also of the right to vote. But it is evident, that this provision only applies to the time of the poll. It occurs in that part of the Act which contains the enactments relative to the poll. The three sections, immediately preceding section 54, are entirely taken up with the details of what is to be done at the poll: the same subject is continued in section 54; and amongst other provisions, it is enacted, that the certificate shall be conclusive. It is true, that the words, "at the poll," are not added, nor was there any occasion for them; the provisions which immediately precede and follow the one in question, having reference only to the poll; and it never could have been contemplated by the framer of the clause, that whilst he was providing for the routine to be pursued at the poll, an intention would be attributed to him, of ousting the House of Commons of one of the most important branches of their jurisdiction, by the casual omission of an express restriction of each clause to the particular subject on which his attention was en-

gaged. But to show still more clearly, that such an extensive application cannot be given to that clause, it would be only necessary to refer to section 59. By that section, a Committee is authorized to strike off the vote of a person, even though his name may be on the register, if he has become disqualified, or parted with his qualification. But if the certificate is conclusive of the right to vote, how can the Committee proceed to strike off the vote? Those who contend that the certificate was conclusive for all purposes, would find themselves placed in an inextricable dilemma. If they denied the power of the House of Commons to inquire into the qualification of a voter, under any circumstances, or for any purpose, they would be met by section 59. If they did not deny this power, what became of the conclusiveness of the certificate?

A great deal of stress had been laid on the elaborate and extensive nature of the provisions for making a register in Ireland; but were those provisions calculated to secure correctness to the register? Nothing could be more easy than for a claimant to get placed on the register in Ireland, if he were unopposed; the only thing requisite was, that he should swear to the value of his land, and from the natural disposition of all persons to estimate highly what belongs to themselves, it cannot be doubted, but that most small holders would be ready, without meaning wilfully to perjure themselves, to assign to their property a much higher value than any indifferent person would do. When the voter has once obtained his certificate, it remains in force for eight years. If his claim is disallowed, he may appeal; and even if it is disallowed, on appeal, he may go on continually, quarter after quarter, renewing his application, till it is allowed. But what is the nature of the appeal, to those who may

1837. object to his vote? They are left wholly without appeal or remedy, unless the power of reviewing erroneous decisions be vested in the House of Commons.

There is one other section of the Irish Reform Act which bears strongly on the question: by section 55, all laws, statutes, and usages, then in force, respecting Irish elections, except so far as they were thereby repealed, were expressly re-enacted. It is clear, that the House of Commons had the power of opening the register before the Reform Act. And the simple question to be asked is, what is there in the Reform Act to take away that power?

Section 55 is also important in another respect. One of the arguments which has been relied on, to show that there can be no power in the House of Commons to interfere with the register is, that the Irish Reform Act makes no provision for a book of registry.

But 60 Geo. III. and 1 Geo. IV. c. 11, s. 29, requires clerks of the peace to make books of registry of freeholders. 10 Geo. IV. c. 8, s. 29, requires the like books; and section 55 of the Irish Reform Act, re-enacts all prior laws, statutes, and usages, not repealed or altered by that Act.

With respect to the contrast which had been drawn between the English revising barrister and the Irish assistant barrister, it was not for him to say, which was the most competent to discharge the duties with which they were severally intrusted. But if, to secure freedom from political bias were an object, he thought the English system of vesting the appointment in judges of assize, much more likely to attain it than the system in Ireland, where the appointment was vested in the Lord Lieutenant. Again, it had been stated in

argument, that the Irish assistant barristers were irremovable; but, on referring to the Act under which they are appointed, (36 Geo. III. Ir. c. 25, s. 41,) it will be found, that they are removable at pleasure. 1837.

No one can contend, that it is desirable or reasonable that an assistant barrister, removable at the pleasure of the Crown, should have the power of putting an alien, an infant, or a woman, on the list for eight years, by giving a certificate against which there is no appeal. If the register cannot be opened, there are no means of preventing a person who has obtained a certificate, without a shadow of qualification, from exercising his vote as effectively as the largest landowner, unless he subjects himself to subsequent disability. If, in short, the register cannot be opened, there can be no controverted election, but Committees of the House of Commons must be irrevocably bound by the decisions of a nominee of the Government.

Mr. *Maule* in reply.

In practice, the assistant barrister is irremovable, as no such removal ever has taken place.

With regard to the objections to the duration of the certificate, and the appeal being only on one side, if these provisions were injurious, let them be altered by Act of Parliament. But were they injurious? The enactment which made the certificate in force for eight years was not new, it had been in operation ever since the year 1795, see 35 Geo. III. Ir. c. 29, s. 31; and although its antiquity ought not to shield it, if it were injurious, yet it was singular to find the re-enactment of a clause which had been in operation, unobjected to for such a length of time, brought forward as an unanswerable reason for refusing to give effect to the Irish Reform Act.

1837. Then as to the objection, that the power of appeal is only on one side, which has been so strongly insisted upon as a reason for opening the register.

It is true, that the power of appeal is only given in case of the vote being disallowed, and this is as it ought to be. The voter is the only person sufficiently aggrieved to make an appeal necessary; and if an appeal lay against the voter, it would be used as a means of oppression.

But grant this to be an objection, and give it the utmost weight, how little does it amount to! In the case of votes unobjected to, the same cause which prevented an objection before the assistant barrister would prevent an appeal. In the case of those votes in which there has been an objection before the assistant barrister, both sides must have been heard, the case must have been fully entered into; and if the case made out against the qualification were too clear to admit of doubt, the decision could not on any occasion be in favor of the vote, unless the assistant barrister be supposed to be wilfully corrupt. Even if the assistant barrister were corrupt, he has no power to disfranchise an adverse voter, as an appeal lies against his decision. As however the charge of corruptness has only been alluded to for the purpose of illustration, and never has been seriously urged in any quarter, the whole imputation against the Irish Reform Act is, that in cases of doubt, it has a slight inclination in favor of the franchise. And is this a sufficient reason to justify a Committee of the House of Commons, in turning the whole of that Act into a mockery and an illusion, and in claiming powers in adjudicating upon petitions in Irish elections, beyond those conferred by the Irish Act; while in English and Scotch cases, they uniformly have consi-

dered their powers as arising out of, and limited by, the Reform Acts of England and Scotland ? 1837.

The basis on which the greater part of the argument on the other side has gone, is, that previously to the Reform Act, there existed a registration of voters in Ireland, and that such registration did not abridge the powers of the Committees of the House of Commons, to inquire into the qualifications of voters. But it would be found on examination, that neither of these propositions could be sustained. There had been certainly a registration of freeholds, but nothing like a complete registration of voters ; and the whole of the provisions with respect to the conclusiveness of the certificates, granted under the systems previous to the Reform Act, went no further than to make those certificates conclusive of the fact, that the freehold had been registered. There never had been an attempt made to obtain a complete registration of all persons entitled to vote ; on the contrary, owners of rent charges under certain circumstances, 35 Geo. III. Ir. c. 29, s. 39 ; beneficed clergymen, 35 Geo. III. Ir. c. 29,* s. 40 ; and other classes of voters, were expressly allowed to vote without registration. The old registration of the freehold was only in the nature of an additional title deed, and did not preclude an inquiry into the qualification.

Again, the assumption that the powers of inquiry of Committees of the House of Commons, had not been abridged by the old systems of registration, was quite erroneous. It would occupy too much time, and lead him too much from the question under discussion, to inquire to what extent and in what manner this effect had been produced. But he would adduce one instance in which their power of placing on the poll a person who had a qualification, and who had tendered himself at the poll, but had been refused by the returning

1837. officer, was taken away by the Registration Acts. By 10 G. IV. c. 8, s. 3, no person could be admitted to vote at an Irish county election by virtue of a freehold of less than £20, unless he were registered. Hence, whilst that Act was in force, if a person possessed of such a freehold who, but for the Registration Act, would have been a good vote, but who had not been registered, had tendered himself at the poll to the returning officer and had been refused, a Committee of the House of Commons could not on a petition have ordered his name to be placed on the poll. However good his qualification, however earnestly and regularly he may have sought to be placed on the register, and however corrupt or capricious the motives which may have led to his exclusion from the register, still the clause in the Registration Act would have been a complete bar to the exercise of his franchise, and a Committee of the House of Commons could have afforded him no protection or redress.

Thus it appeared, that neither of the grounds was tenable, on which the principal part of the argument in favor of opening the register, in accordance with the practice under the old system of registration had proceeded. For the old registration of freeholds was not at all analogous to the registration of voters introduced by the Reform Act; and the old registration of freeholds, imperfect as it was, had in some measure abridged the powers of Committees of the House of Commons.

Great stress had been laid on the provisions of 10 Geo. IV. to show, that parts of the machinery of registration adopted in the Reform Act had existed previously. But so far as that argument was applicable at all, it went to justify the increased confidence reposed in that machinery under the Reform Act, by showing that the system was not a crude experiment,

but had stood the test of actual trial, and been found **1837.**
practically to answer the purposes for which it was
intended.

It had been contended, that although no express provision is contained in the Irish Reform Act for making a registry book, yet section 55 continues by implication the system of keeping registry books, which existed under the old registration. But as the subject matter of the two systems of registration was different, it is obvious that the continuation of a registry book of freeholds would be of no service, when the object was to have a complete registration of all the voters, including freeholders, copyholders, leaseholders, owners of rent charges, beneficed clergymen, and every class of voters.

He did not think it necessary to answer the arguments, by which the plain meaning of the expressions in sections 54 and 59 had been attempted to be explained away, and a forced construction to be put on them, except by stating in what sense the word "conclusive" must be taken to have been used in the 54th section. The certificate is made, by section 54, a conclusive judgment by a court of competent jurisdiction. But it is only conclusive of that which was adjudicated; it produces no magical effect of preventing a person from losing subsequently the franchise which has been adjudged to him. It is conclusive of the right of the party to be put on the list at the time he appeared before the assistant barrister. It is not conclusive, even at the poll, of the continuance of the qualification at that time, which may be inquired into then by administering the oath prescribed in section 54, and before a Committee, by all legal modes of evidence; nor does it prevent a Committee of the House of Commons from inquiring, whether the voter had become disqualified

1837. subsequently to the period when the certificate was given to him, a power expressly conferred by section 59.

The main ground on which he had denied the power of a Committee to open the register, founded on the nature and origin of the inquiry into the qualification of voters by the House of Commons, as merely incident to their right of inquiring into the conduct of the returning officer, remained entirely unanswered. Nor could it be answered, for this simple reason, that it was matter of history, and indisputably true. And if admitted, it was all that was required for the purposes of his argument. For it was a necessary inference from the admission, that as the returning officer could not inquire into the right of a party to be put on the register, who had been adjudged by the assistant barrister or judge of assize to have that right, so neither could the Committee, in reviewing the conduct of the returning officer, make the least inquiry.

It would be easy for him to produce numerous authorities to establish the position, that a previous existing jurisdiction would be taken away by implication, by the mere creation of a new jurisdiction. (1) But in the case under consideration, if it were admitted that the jurisdiction of Committees of the House of Commons, was only an appellate jurisdiction from that of the returning officers, it required no authorities to show, that the matters withdrawn from the jurisdiction of the returning officer, were necessarily withdrawn from that of the Committee. And although it may be said, that when the functions of the returning officer were transferred to the assistant barrister, it was but reasonable that the decision of the assistant barrister should be made subject to the control of the House of Com-

(1) This point was fully argued by Sir W. Follett in the Oxford case, C. and R. 159. P. and K. 87.

mons, yet the answer to this is complete, viz. that 1837.
however reasonable it might have been, it has not been
done. But he would go further, and assert, not only
that no such control has been given to Committees,
but that none such could reasonably or conveniently
have been given, or was intended to be given. For if
the register had been intended to be opened by the
Committees, some machinery would have been provided
for enabling them to correct the register. If it had
been intended to give them the power of disfranchise-
ment, the system of giving certificates to voters would
not have been adopted ; for an Act which had intended
to give a power of disfranchisement, would never have
provided for leaving in the hands of the party disfran-
chised a certificate which was conclusive of his right to
vote. Again, if the Act had intended to enable Com-
mittees to disfranchise, it would also have enabled
them to enfranchise. The House of Commons has
always been looked on as the protector of popular
rights ; and it would be an inconsistency to give them a
jurisdiction, whose only object was to assail the rights
of those whom they represented, without enabling them
in the slightest degree to protect them. And no one
can contend for a moment, that a Committee of the
House of Commons could place on the poll the name of
any unregistered person ; for by section 13 of the Irish
Reform Act, it is expressly enacted, that no unregistered
person shall vote at any Irish election.

It only remained for him to consider the weight due
to the array of reported cases which had been brought
forward so triumphantly against him. Those cases
showed strongly the dangerous effect of a first erroneous
impression ; but they also showed, that Committees of
the House of Commons would not persist in a wrong
decision, when its error was clearly pointed out. The

1837. whole of the errors and inconsistencies which Committees had fallen into on this question, were to be attributed to the first four decisions, all made within a short period of each other, in the spring of 1833. The next decision was the first Carlow case, in which, after a patient examination, the Committee felt satisfied of the illegality of the course which had been pursued, and refused to open the register. There have been only three reported decisions subsequent to the first Carlow case; and it is remarkable, that in every one of those the four decisions previous to the first Carlow case have been repudiated. It is difficult to understand on what principle the register has been opened to the limited extent to which these three latter decisions have gone, for it is a question that admits of no limitation; either the Committees of the House of Commons have no power of opening the register, or they have the same extensive power of inquiring into the qualification of voters as they had before the passing of the Irish Reform Act. Still the unwillingness of Committees in the latter cases to follow the clearly illegal decisions which preceded the first Carlow case, give ground for the expectation, that if the power assumed in the latter cases be clearly shown to be equally illegal, the law will in future be allowed to follow its due course. It would not be satisfactory to close this reference to the reported cases, without shortly recapitulating the actual decisions which had been come to by the several Committees who had sat in those cases. The four Committees, whose decisions had not been acted on in any subsequent reported case, were the Longford, 19th March, 1833; the Galway Town, 23d April, 1833; the Coleraine, 7th May, 1833; and the Galway County, 14th May, 1833. The decisions in those cases were as follows:— in the Longford case the Committee determined, “that they had the power to examine into the validity of the

votes standing upon the register." In the Galway Town case the decision was, that "a vote unobjected to at the registry, may be questioned before a Committee." In the Coleraine case a claimant, who had been rejected by the assistant barrister in Ireland, and had tendered his vote at an election, was placed on the poll by the Committee, although he had not appealed to a judge of assize from the decision of the barrister. A most extraordinary decision, directly in the teeth of section 13 of the Irish Reform Act, claiming for a Committee of the House of Commons, a power which, as has been seen, they did not possess before the passing of the Irish Reform Act, under the old system of registration. In the Galway County case the decision was, "that the Committee are competent to scrutinize the right of voters admitted by the registering barrister;" and the reporter adds in a note, "no objection had been raised to the right to vote before the barrister." It appears, from the subsequently reported cases, that the authority of the above cases has been entirely discarded. The next case is the Carlow County, 14th May, 1833; where the Committee decided, after hearing an argument, by Sir Wm. Follett, in favor of opening the register, that "it is not competent to a Committee to enter into an examination of a voter's qualification, where his name stands upon the register." Since that case there have been three reported cases, but in neither of them has the question, whether the register can, or cannot be opened, been broadly decided. They have all been qualified decisions, admitting that the power of inquiry of Committees has been restricted by the Irish Reform Act, and attempting to supply from the analogy of the English Reform Act, and other sources, what was assumed to be a defect in the Irish Reform Act.

Those three decisions are as follows:—the Clonmell case, 16th May, 1833; in which the substance of the

1837. decision is as follows: "Committees have the power to inquire into the qualification of such persons on the list of voters admitted by the barrister as have been *bonâ fide* challenged before him. But evidence not before the barrister is not admissible before Committees, unless the party was precluded from giving it by the decision or conduct of the barrister." In the Monaghan case, 2nd July, 1834, the Committee "would not go into evidence affecting votes, unless the objection was urged before the Court of the Registering Barrister at the time of the registration." In the Cork City case, 9th April, 1835, the Committee decided, "that they would not enter into the consideration of the validity of a vote upon the register, except in the three cases of an irregularity in the mode of registration, of an objection having been taken before the barrister at the time of registration, or of an objection having arisen against the vote subsequently to the registration."

Such were the reported decisions on the subject; and they displayed so much confusion and inconsistency, that it was highly necessary for the question to be put on some intelligible footing.

He should not trespass longer on the time of the Committee; the question was one of great importance; he trusted that they would not add to the confusion by giving a qualified decision, but that if they agreed in the view which he had adopted, they would conclusively close the register, and thus do what lay in their power to set the question finally at rest.

The Committee inquired whether, according to Mr. Maule's view of the question, it would be legal for a commission to be sent over to Ireland to inquire into the right of a registered voter to have his name placed on the register.

Mr. Maule.—Certainly not.

Resolved—"That the Committee had decided not to open the register as affects the case of John Allen." 1837.

PATRICK BARRY'S CASE.

Mr. *Austin* handed in List No. 2, of which the following was the heading: "List of persons improperly allowed to be registered for the purpose of voting, and who did vote at the last election for Nicholas Aylward Vigers, Esquire, to each of whom is objected, by reason that he was not entitled, at the time of registry, to lands or tenements to the clear yearly value of £10, over and above all rents and charges;" this voter was also in List No. 8. The voter was selected from the present list as one against whom the case of the petitioners was the strongest; the facts were as follows: he was struck off the register under the authority of the Speaker's warrant, on the ground of insufficient value. Two months afterwards, no increase having taken place in the value of his farm, viz. in October 1835, he applied to be registered afresh; was opposed and rejected. In January 1836, his farm remaining of the same value, he again applied to be registered, was opposed and admitted. He had tendered himself at the poll, and been allowed to vote for Mr. Vigers. It would be obvious to the Committee, from the state of facts which he had detailed, that the circumstances of the case were fraught with the greatest possible suspicion; and his object in bringing it forward was to ascertain whether the Committee considered the register to be so conclusive, that under no possible circumstances could they inquire into the qualification of a person who was registered.

Mr. *Maule* contended, that this vote came within precisely the same principle as that which had been decided in John Allen's case.

1837. Resolved—"That the Committee have decided not to open the register as it affects the case of Patrick Barry."

The *Chairman*, after having made known the resolution, intimated that, in deciding the case of a particular individual, the Committee wished to act on the understanding with the Counsel, that they were not to discuss again the cases which came under the same classes.

JOHN COADY'S CASE.

Mr. *Austin* then handed in List No. 6, of which the following was the heading: "*List containing the names of 35 persons who, upon the trial of the last petition, complaining of an undue election and return for the county of Carlow, were objected to, as not being entitled to vote, and whose votes were determined by the Committee assembled to try that petition to be bad votes, and whose names were duly removed from the register, in obedience to the warrant of the Speaker, but who afterwards voted at the said election without having again been placed upon the register.*"

He stated that the objection to the vote in question, in common with all the others contained in the list, was that his vote had been contested before the last Committee, and decided to be bad; that it had been struck off the register in obedience to the Speaker's warrant; and that the voter had never registered since.

Where a voter's name had been struck off the register, in obedience to the Speaker's warrant, the Committee refused to

Mr. *Maule* objected to this class of voters being entered into. The House of Commons had no authority to make an order for striking names off the register. If this Committee has not the power to open the register, neither had the former Committee. And the Speaker's warrant, founded on the report of that Committee, was a nullity. It would not be necessary again to go through all the clauses of the Irish and English Reform Acts, but gene-

rally to recall to their recollection the grounds which he had laid down in his previous arguments to establish the position, that Committees had no jurisdiction to open the register. He had nothing to fear from the most ample scrutiny into those grounds; the more they were sifted and inquired into, the more incontrovertible would they appear.

1837.

question
the legality
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sure.

On grounds of policy, the great expense incident on an inquiry into the register was a strong reason for supposing that Parliament never intended to give to the House of Commons the power of opening it. But, not to dwell on minor arguments, if the Committee were satisfied that the only jurisdiction which ever belonged to the House of Commons over the qualification of voters, was either what was given to them by express enactment, or what was incident to their appellate jurisdiction over the returning officer; if they were satisfied that the enactment in the Irish Reform Act which rendered the certificate conclusive precluded any inquiry into the qualification of the person who possessed that certificate, they ought not to hesitate to carry out, to the full extent, their previous resolution. They had twice decided that they, as a Committee, had no power to open the register; those decisions necessarily involved the principle, that the former Committee had no such power. And, if this were conceded, then the erasure made in pursuance of their report was a nullity, and could have no effect.

The only difference between the cases which they had previously decided and the present was, that although in those cases, as well as in the present, there was a previous null and void warrant of the Speaker, in the former cases the voter had been subsequently registered, in the present case he had not. The judgment of the assistant barrister could not be affected by being obliterated, unless it had been legally reversed.

1837. The Resolution of the House of Commons of the 23rd of June, 1835, under the supposed authority of which the warrant of the Speaker was issued is as follows: "That in all cases where a select Committee appointed to try the merits of an election for any county, city, or borough, report to this House, that the names of any voters ought not to have been placed on the register of voters, or that the names of any voters have been unduly omitted from such register; Mr. Speaker shall issue his directions thereupon to the clerk of the peace, town clerk, or other officer with whom the register of voters of such county, city, or borough is deposited, to amend such register, by striking out or adding names to such register, as the case may be, in conformity to the report of such Select Committee."

Now this resolution is founded on section 60 of the English Reform Act, and cannot be made applicable to the Irish registration, which consists merely in a collection of filed affidavits. If it were applicable to the Irish register, it would authorize the putting names on to the register as well as striking them off. And it could not be contended for a moment that the House of Commons had any power to put names on to the Irish register. Even the Coleraine case did not go to this extent; and even if it had, it would have been useless, for the House of Commons could neither give the voter a certificate, nor prepare an affidavit for him, and without those he could not vote. On these grounds he contended that the erasure of the names ought to be treated as a nullity.

Mr. *Thesiger*.—The question is whether a voter, struck off in pursuance of a Report of a previous Committee, by a clerk of the peace, acting in obedience to the Speaker's warrant, and never having since been registered, is entitled to vote. Let it be granted, that the right of voting

once existed, still by the erasure from the register, that right has been destroyed. The resolution of the 23rd. of June, 1835, is not restricted to sections 59 and 60 of the English Act, for if so, what meaning can be assigned to the word "all" in that resolution? By 9 G. IV. c. 22, s. 40 and 41, the Committee is authorized to decide on controverted elections, and their determination is made final between the parties; and to report on other matters to the House, who may make such order thereon as to them shall seem proper. This Committee is not a Court of Appeal from the former Committee, and cannot review its decisions. The name not being on the register which constitutes the qualification, the voter must be rejected. The voter has been designedly deprived of his vote in pursuance of a resolution of a former Committee of the House of Commons, and how can this Committee reverse that decision? The title of the voter has been taken away by a deliberate act of the House of Commons, and how can this Committee restore it? 1837.

If it should be decided that the House of Commons have not the power to strike a name off the register under any possible circumstances, although they may strike a name off the poll; the voter may tender himself again with his conclusive certificate, and again claim to be put on the poll, although he has previously been adjudged to have no qualification, and although he has never obtained any subsequent qualification.

Mr. *Maule* in reply.—There is no book of registry. The file of affidavits is the register. In construing the resolution of 1835, this becomes a material distinction. The resolution only authorizes the insertion or striking out a name from the register. This is not applicable to a register consisting of a file of affidavits.

He did not contend that this was a Court of Appeal from the former Committee. But surely they were not

1837

stopped from inquiring, whether the former Committee had exercised a legal jurisdiction, or had assumed a jurisdiction which did not belong to them.

He did not ask them to restore the name to the former poll, but merely to say, that the unauthorized erasure of the voter's name from the register had produced no effect on his right to vote.

Although 9 G. IV. c. 22, s. 41, empowers the House of Commons to make such orders as they shall think proper, yet this only authorizes them to make such orders as are consistent with their legal powers; if it were otherwise, section 60 of the English Reform Act would be unnecessary.

The safeguard against parties coming a second time with a certificate, after having lost their qualification, is in the penalties.

Resolved.—“ That the counsel for the petition may proceed with the case of John Coady.” (1)

(1) In order to give a complete view of the present state of the questions decided upon in this and the two preceding resolutions, the following account is inserted, abridged from the *Mirror of Parliament*, of what subsequently took place in the House of Commons, on the subject of the Longford controverted election.

On the 4th of May, 1837, Lord Clive, the Chairman of the Longford Committee, after the report of that Committee had been read, in which it was stated, that the Committee had struck the names of ninety-two persons off the poll, brought up the following special report:—

Your Committee further specially report, that it seems to them highly desirable that some declaratory Act should be passed, in order to insure uniformity of practice and decision respecting the true meaning and intent of certain clauses of the Act to amend the representation of the people in Ireland.

Your Committee suggest, that Parliament should decide, by some distinct enactment, whether the admission of voters to the registry by the assistant barrister, ought to be deemed conclusive of their right to vote; or whether such registry ought to be opened, either partially or entirely, by an inquiry into such voters' right before a Committee of the House of Commons.

The Committee also suggest, that the nature and amount of the elective franchise in Irish counties should be defined so clearly, that the right to vote may no longer depend upon the varying decisions either of assistant barristers

The poll books for the former election of June 1835 1837.
 were then produced ; and in order to prove them, the clerk of the peace for the period, from the election in June 1835 to May 1836, and his son, who had succeeded him in the office in May 1836, and still continued to hold the office, were both called. The father proved, that the poll books were deposited by him in his office at Carlow, and

of Committees of the House of Commons.—*Mirror of Parliament for 1837*, p. 1317, 18.

On the 9th of May, 1837, Mr. Lawson moved—"That Mr. Speaker be directed to issue his warrant to the clerk of the peace for the county of Longford, to strike off the register of electors of the said county, the names of the ninety-two electors of the said county who were reported by the Committee appointed to try the merits of the last election for that county, as being upon the register, but as not being entitled to vote at that election."

Mr. H. Grattan moved as an amendment, to leave out from the word "That," to the end of the question, in order to add the words "The Speaker of the House of Commons has no authority by law to issue his warrant to the clerk of the peace of any county, city, or town in Ireland, directing him to strike off from the register the name of any elector."

A debate ensued, in the course of which the *Attorney General* directed attention to the form of the report of the Committee, which would not authorise the application of the resolution of June 1835; he also observed, in reference to the power of the House of Commons to strike off votes from the Irish register, "I have no hesitation in saying, that the resolution of the 24th of June, 1835, so far as it extends to Ireland, is contrary to law. We are not now considering what the law ought to be, but what it is. I must say, however, that if I were called upon to decide what the law ought to be, I should hesitate considerably before I determined that the fate of these voters should depend on the capricious decisions of an election Committee; I should desire to see the system of election Committees reformed and improved, before I could consent to their decisions being final, as regards the franchise of electors."

Lord Stanley is reported to have said, in the course of that debate, "I will not pretend to discuss the legal point, but I think it is open to grave consideration, whether the House has the power or not. Certainly the practice of the House has been to extend the resolution to Ireland. There has been one case since 1835, and a considerable number since 1833. I must say that I should hesitate before I could agree to the proposition, that the Speaker has not the power of doing that which we find has already been done uninterruptedly in so many instances."

Eventually, both the original motion and the amendment were withdrawn, and the names allowed to remain on the register.—*Mirror of Parliament for 1837*, p. 1416—18.

1837. left there, with other documents, when he retired from office ; that he had resided in Dublin whilst in office, and only attended at Carlow at the assizes and sessions. The son proved, that he had brought the books from the office in Carlow, in which they had been left by his father.

Poll books of a former election admissible, when produced from the proper depository, without rigid proof of safe custody.

Mr. *Maule* objected that the custody of the poll books had not been sufficiently proved, and cited the Roscommon case (1), and Shepherd on Elections (2).

Mr. *Thesiger*.—These are not the poll books of the election now in dispute, if they were, it would certainly be necessary to prove that they had been delivered by the sheriff to the clerk of the peace, and were in the same state, without erasure or obliteration. But as these were the poll books of a former election, it was not necessary to prove their safe custody with the same accuracy, but they stood on the same footing as any other record. He also protested against the Roscommon case being drawn into a precedent, for if it were, it would only be for the clerk of the peace to turn his back on the poll books, in order to prevent the possibility of a controverted election.

He was then stopped by the Committee.

Mr. *Maule* claimed his right to reply, which was conceded.

Resolved—That the custody was sufficiently proved, as the poll books were those of the former election.

Mr. *Thesiger* then handed in the list of voters objected to on the trial of the last petition, which contained John Coady's name ; the objection there stated was, that the voter had not been in possession of the land leased to him for six months prior to his registering.

The report of the former Committee was then read from the Journals of the House ; from which it appeared

(1) K and O, 259.

(2) 2d edit. p. 106.

that the former Committee had altered the poll by striking off, amongst other names, that of John Coady, as not having any right to vote, and who ought not to have been put on the register. 1837.

The Speaker's warrant was also put in, and a letter from the Speaker's secretary to the clerk of the peace of Carlow county, requiring him to strike out the names from the register, in conformity with the report of the Committee.

The clerk of the peace proved the receipt of these documents; that he struck John Coady's name out of the registry book, which was a book made out in the office of the clerk of the peace, and wrote opposite to the erasure, "struck off by the Committee;" and that he removed John Coady's affidavit, together with those of the other persons whose names were ordered to be struck off from the general bundle of affidavits, and put them in a separate parcel by themselves.

The poll books of the election in 1837 were also produced, from which was read as follows: "John Coady, second day's poll. Objected, no affidavit, no certificate, and struck off the register.—Allowed."

It was also proved by Mr. Hayes, who had attended the registration in October 1836, as counsel for the party opposed to Mr. Vigors, that John Coady had applied to be registered in October 1836, and had been rejected on the ground of insufficiency of value.

Mr. *Maule* cross-examined this witness, for the purpose of showing that the objection to the validity of the voter's original registration in 1832 had been, that he had not been in possession, under such a title as would confer a vote for six months, although he had been in actual possession of the land for upwards of six months, and had a sufficient title to confer a vote at the time of the application to register, an objection which had been

1837. overruled by Mr. Serjeant Green, when going circuit as judge. The witness only remembered that such an objection had been taken to some of the voters, but could not say whether Coady was one of them.

Mr. *Maule* then addressed the Committee in defence of the vote.

The Irish Reform Act provides only for a certificate and affidavit, and that is all which is necessary to be done to register the voter. In this case the affidavit is the registry; and unless that had been destroyed, the registry of the particular voter still remains. It was difficult to understand how the warrant of the Speaker could be effectual to destroy the affidavit; but even if it were so, in this case it had not been complied with.

Resolved—"That the vote of John Coady be struck off the poll."

Thirteen votes similarly circumstanced with Coady's were then struck off by consent.

WILLIAM BRENNAN'S CASE.

Mr. *Austin* produced a list of the names of William Brennan, Michael Walsh, and five other persons, whose names were all included in List No. 6, who had all been registered in October or November 1836; and the names of all, except Michael Walsh, were also included in List No. 7, the heading of which stated the objection to be, that the voters' names "had been duly removed from the register, in obedience to the warrant of the Speaker, without having been registered six months previous to the teste of the writ for the said election."

He commenced with the case of William Brennan; and stated that the voter had been re-registered on the 3d November, 1836; and as the writ for the last election had been delivered to the sheriff on the 3d February,

1837, there was, in fact, only a period of three months 1837.
between the registration and teste of the writ.

Mr. *Rushton* objected to the sufficiency of the statement of the objection in the heading of List No. 6. By 42 G. III. c. 106, s. 3, parties appearing before a Select Committee for the trial of controverted elections were required, before any other business, to interchange lists of voters objected to. And by 9 G. IV. c. 22, s. 15, no evidence is allowed to be adduced against a voter upon any head, except that specified and particularized in the list. In this case the voter's name is on the register. The only objection stated in the heading of List No. 6 is, that the voter had been struck off by the Speaker's warrant, which objection had already been overruled by the decision in John Allen's case, as far as regards persons who had been registered.

What a sufficient specification of an objection in heading of list.

Mr. *Austin*.—The objection is sufficiently stated. The whole objection is, that the name was struck off the register in obedience to the Speaker's warrant; the addition of the immaterial fact, that he has not since been placed on the register, cannot affect the statement of the previous objection. Now, unless the voter had been on the register six months before the election, his having been again placed on the list is immaterial. At the time of the last petition, the last register was the register of June 1836; that was also the register in force at the time of the election, which is now controverted.

The first point is, whether the petitioners have truly specified the objection.

Secondly, if too much has been stated, could the voter have been prejudiced by the additional statement? The additional statement is true; for the register on which the vote has been subsequently placed, is an immaterial register, or, even if not true, it could not have misled.

1837. Resolved—That the petitioners be allowed to proceed with respect to the vote of William Brennan, in class No. 6.

The names of William Brennan, and six other voters similarly situated, including William Walsh, were then struck off.

THOMAS BULMER'S CASE.

What sufficient evidence to identify a voter as the person directed to be struck off the register by the Speaker's warrant.

Mr. *Austin* produced the Speaker's warrant, in obedience to which the name of Thomas Bulmer, of Rathvilly, had been struck off the register. He also produced the book of registry; from which it appeared, that Thomas Bulmer was registered in November 1832, and opposite to his name was the following memorandum, "struck off the book of registry by order of the Committee of the House of Commons."

The affidavit of Thomas Bulmer, of Rathvilly Barony, was also put in, dated November 3, 1832; it was not cancelled, but indorsed, "struck out of the registry."

Mr. *Maule* then called for Mr. Humfrey, senior, the witness who produced the registry book, for the purpose of cross-examining him, which he claimed a right to do, *toties quoties*, upon each vote, in respect of which the registry book was produced.

From the cross-examination of this witness, it appeared, that some mistakes had happened in the erasure of the names in obedience to the Speaker's warrant, and that the register was otherwise inaccurate. And the Committee intimated, that they could not place much reliance on the correctness of the registry book after so many instances of mistakes.

Mr. *Maule*. (1)—In this case there is a material defect

(1) In the course of the argument on this vote Mr. *Maule* referred frequently to the resolution of the Committee in John Allen's case, and was resting his case on that resolution, when he was interrupted by the *Chairman*,

in the evidence ; viz. the absence of the poll book. In 1837.
 the former cases the Speaker's warrant was produced, and the poll book was also produced, and the production of both was necessary, for the Speaker's warrant pointed to the person who had voted by a certain name and description as the person to be struck off. And by the production of the poll book, which was the only proper evidence to show who did vote, the individual voter was identified as the person who then voted, and whose description corresponded with that of the person who was ordered to be struck out of the register.

Here they produce a book kept most loosely by the clerks of the clerk of the peace, showing that the name of Thomas Bulmer had been struck off ; they also produce the Speaker's warrant, ordering the name of the Thomas Bulmer *who voted at the last election* to be struck out ; but they do not show that the voter now objected to voted at the last election, and therefore they do not identify him.

The voter Thomas Bulmer had no access to the book from which his name is erased ; and is an erasure of his name from that book, to be conclusive against him, although it is not shown that he comes within the description of the person whose name was ordered to be struck off by the House of Commons ?

Unless Thomas Bulmer voted, he does not come within the description of the Speaker's warrant. The Speaker's warrant enumerates a vast number of names, and in many cases there are several persons of the same name, in this very document. The evidence is also defective on another ground ; for the Committee who sat on

who said, You carry our resolution further than it really went ; our resolution was, that we would not in the particular case re-open the register ; we never decided that under no possible circumstances could we re-open the register.— See *infra*, p. 80.

1837. the last Carlow election had no jurisdiction to inquire into the vote of Thomas Bulmer, whose vote is now in question, unless he voted at the last election.

Mr. *Austin*.—The issue of fact is that tendered in the heading of the list, viz. Was the voter Thomas Bulmer a person whose vote was determined on by the last Committee, and who, by order of the Speaker, was struck off the register? Before the last Committee, it was necessary to produce the poll book; here we only want to prove that the vote was litigated before the last Committee. We show it thus:—

Mr. *Austin* then read the short-hand writer's notes, in which was the following entry—"Thomas Bulmer, of Polvill, who polled No. 6 at the last election."

The Report of the Committee does not set out Thomas Bulmer as of "Polvill;" nor does the Speaker's warrant. But Thomas Bulmer, of Polvill, was the only Thomas Bulmer whose vote was in dispute; and he is the only Thomas Bulmer on the register.

With respect to the registry book, the only question is, can it be received in evidence? If it is not evidence, the objection should have been taken before the book was put in. But the book is on the table, it has been admitted in evidence, and the objection, even if it were valid, would be too late now.

It is immaterial to this inquiry, whether Thomas Bulmer voted at the last election. The only question is, was the vote litigated before the last Committee, and determined on.

Mr. *Maule* in reply.—The heading of List No. 6 means, that the voter was struck off in a legal way. And, in order to prove this, you must show, not merely the decision of the Committee, but the preliminary proceedings, so far as they are necessary to show the jurisdiction. Unless Thomas Bulmer polled at the former election, the

Committee had no jurisdiction to inquire into his vote. 1837.
 As to the short-hand writer's notes of the proceedings before the last Committee, they are no evidence of the facts which were proved before the Committee, and consequently they cannot prove that Thomas Bulmer polled. If it is necessary to prove that Bulmer polled at the last election, the case against his vote is not proved; for the only proper mode of proving that he polled is, by the production of the poll book.

In the Dover Case, an action was brought against Mr. Halcomb for costs (1), on an order of the House. The Chief Justice required proof of all the preliminary proceedings. And there can be no doubt of the propriety of that decision; for one tribunal cannot presume the decision of a previous tribunal to have been on a matter within their jurisdiction, without proof. If then it is necessary that the fact of the voters having polled should be proved, it is clear that the Committee cannot presume that fact, without the production of the poll book. The production of the poll book is necessary, to show the jurisdiction of the former Committee; it is also necessary to show the identity of the vote. Suppose that there had been two Thomas Bulmers, and that the person whose name was ordered to be struck off had voted at the former election, without his name having ever been on the registry book; if such a case were supposed, the absurdity of disfranchising the voter whose name was on the registry book, because another person of the same name had voted on an insufficient qualification, would be self-evident. To show this case to be a possible one, it would be found, on reference to the registry book, that such an error had occurred in the case of Dominick Dillon, who voted at the election of 1837, and yet his name is not in the registry book.

(1) *Bruyeres v. Halcomb*. 3. Ad. & E. 381. 5 N. & M. 149.

1837. Resolved—That the vote of Thomas Bulmer be struck off the poll.

PATRICK BYRNE'S CASE.

What evidence sufficient to identify a voter as the person directed to be struck off the register by the Speaker's warrant.

Mr. *Austin* stated, that this vote was in the same list as the last; and he produced the registry book, in which the entry, "No. 10, Patrick Byrne, freeholder, £10 value, registered 3rd November, 1832," had been erased, and a memorandum was placed opposite to his name, that he had been "struck out by order of the House of Commons." The poll book for the election of 1837 was also produced, in which was the following entry—"Patrick Byrne, Roscat, Rathvilly, registered 3rd November, 1832; objection was made to the vote, and filed." He also put in the objection paper, containing a memorandum of the objection which had been made and filed.

Mr. *Maule* objected to the admissibility of this paper.

Mr. *Austin*.—The memorandum is directed to be made, and attached to the poll book, by 60 Geo. III. and 1 Geo. IV. c. 11, s. 12.

Mr. *Maule* did not admit that the memorandum, if made pursuant to the provisions of the Act, would be admissible, but at least, even if this were admitted, before it could be put in it must be properly authenticated.

Mr. *Austin* then withdrew the paper.

Mr. *Austin* then called Mr. Humfrey, senior, who produced the affidavit of registry; and it appeared from his evidence, that he had produced this affidavit before the former Election Committee had then replaced it with the other affidavits, and afterwards, on receipt of the Speaker's warrant, had separated this affidavit from the general bundle, and placed it separately with the other affidavits of the persons whose names he had struck off, under the Speaker's warrant.

1837.

It also appeared from his cross-examination, that he had found great difficulty in determining who were the persons required to be struck off by the Speaker's order. That he had applied often to different persons for a list of the additions of the persons to be struck off, but never could get them. That being unable to get any authentic information, he acted on the Speaker's warrant, to the best of his judgment, and from his general knowledge of the register.

The minutes of the proceedings before the former Committee were also produced.

Mr. *Maule* in support of the vote said, he should not renew his objection that the poll book must be produced in every case; but as there can be no presumption as to the contents of the poll book, he should endeavour to show, that in this particular case proof of the contents of the poll book was indispensable.

Here an affidavit is produced, which is put into the general bundle of affidavits in London, and afterwards, on receipt of the Speaker's warrant, the clerk of the peace applies the Speaker's warrant by conjecture to the voter struck off. He says he has doubts as to which was the proper Patrick Byrne, for there are four Patrick Byrnes in the register, No. 10, 34, 56, and 83; but that from his general information as to the register, he struck off No. 10, and took the affidavit from the general bundle, and marked it "struck off by order of the Committee." Nothing could be more dangerous than for the Committee to act on such proof; for if the Committee were not to hold the petitioners to strict proof of identity, they might elect whom they would strike off.

Mr. *Austin*.—Patrick Byrne of Roscat was struck off the register. My evidence is, that the clerk of the peace, who is admitted to be disinterested,* tells the Committee

1837. that he heard the vote of Patrick Byrne of Roscat discussed at the former Committee, and that he made the mark on the affidavit in consequence of the Speaker's warrant. This man is Patrick Byrne of Roscat, registered November 3, 1832; the other Patrick Byrnes are of different places, and not of Roscat.

Mr. *Maule*.—No legitimate evidence has been laid before the Committee to identify Patrick Byrne of Roscat with the party to be struck off the register. The absence of the poll book with respect to parties of the same name is fatal. Is the absence of the poll book supplied by the evidence of the clerk of the peace? The poll book not being before the Committee, they cannot receive secondary evidence and look at the minutes: if the contents of the poll book are essential, the Committee cannot look to any thing but the poll book; the minutes would be but secondary evidence of a written document, admissible only after accounting for the non-production of the original; but here no attempt has been made to account for the poll book. The evidence of identity is only the recollection of the witness, which is slight and secondary.

Resolved—That the vote of Patrick Byrne be struck off.

In consequence of this decision six other names were struck off the poll by consent.

JOHN KELLY'S CASE.

Mr. *Thesiger* proposed to strike off this vote, which was in the same list with the preceding; but

The Committee intimated, that they were not satisfied with the account which had been given of the missing poll book in the preceding cases, and wished the Messrs. Humfreys to be examined on the subject.

From their examination it appeared to be very doubtful whether the missing book had been left in Ireland (1) or had been lost in London. A letter had been sent to Ireland requesting that the missing book should be forwarded if it could be found, but no answer had been received to that letter. 1837.

The registry book was then put in evidence, in which was entered, "John Kelly of Roscat struck off by order of the House of Commons;" and the poll book of the election of 1837, in which was the following entry, "John Kelly, Roscat, Rathvilly, registered 22nd of October, 1832; objection made to vote and filed."

The affidavit of John Kelly was also put in, and the minutes of the proceedings before the former Committee. It was also proved that John Kelly was objected to at the poll, on the ground of his name having been struck off by the former Committee, and that he had voted on a certificate, dated the 22nd of October, 1832.

The objection paper was then tendered, but it had not been signed by the sheriff or assessor; the objection was one which had been previously decided on by the Assessor.

Mr. *Maule* objected to the admissibility of the document, on the ground that it had not been signed by the sheriff or assessor.

An objection paper received in evidence, although not signed.

Mr. *Thesiger* read a printed instruction signed by the sheriff, directing that no objection should be taken before the assessor of the same class as any which he had previously decided.

Mr. *Maule* further objected, that 60 G. III. and 1 G. IV. c. 11. s. 12, was repealed by 2 and 3 Wm. IV. c. 88, s. 54.—See *Rogers on Elections*, 3rd edition, App. 288. The statute is rightly construed by Mr. Rogers, in treating this latter section as virtually repealing the

(1) The poll book eventually turned out to have been left in Ireland.

1837. former provisions. For when this latter section provides the full detail of what shall take place, it necessarily repeals all the previous modes of objecting to and impeding the voter: hence the mode of objecting by a paper in the old form is no longer authorized by law; and such an objection paper is not now evidence to show that a particular objection was taken.

Resolved.—That the objection paper be admitted *valeat quantum*.

Mr. Humfrey, senior, was recalled: he produced the affidavit of John Kelly of Roscat, and proved that he had produced the same affidavit before the former Committee, and had indorsed it, “struck off by order of the Committee.” On cross-examination, he stated, that he had marked “query” opposite John Kelly’s name on the Speaker’s warrant: that he had applied in vain in several quarters for the additions of the persons to be struck off, and eventually had struck them off, according to the best of his judgment. He also corrected his previous statement, that he had struck off the names from his general knowledge of the register, by stating that he had since recollected, that in doubtful cases he had referred to the poll books.

The Committee clerk who acted before the former Committee, proved that he had made a memorandum opposite the name of John Kelly, whose case stood amongst those of several Roscat voters, signifying that he was to be struck off. The minutes of the proceedings before the former Committee were also read.

What sufficient evidence to identify a voter as the person directed to be struck off the register

Mr. Maule objected to the sufficiency of the evidence, and contended that the identity of John Kelly was not proved. In the Barony of Rathvilly there are six John Kellys, and the Speaker’s warrant orders two John Kellys to be struck off.

The decision of Patrick Byrne’s case was only a de-

cision on the particular case. Even if the Committee had decided that the production of the poll book was immaterial, he should be disposed to contend, that such a decision was erroneous. But he need not go to that length; for in this case Mr. Humfrey could, on his own showing, have had no other means of ascertaining who the voter to be struck off was, except by the poll book. Yet that poll book is not produced, nor is any satisfactory account given of the loss of the poll book, so as to let in secondary evidence.

1837.

 by the
Speaker's
warrant.

If the poll book is necessary to complete the case against John Kelly's vote, the only question is, have the petitioners given sufficient evidence of the loss of the poll book to allow them to enter upon secondary evidence? It is clear that they have not; for there is no evidence of the destruction, none of a search in the proper repositories.

Mr. *Thesiger*.—The only questions are, whether the poll book was material, or, if material, whether the petitioners have sufficiently accounted for the non-production of it? On looking at the register, although there are six John Kellys, yet there is not one of them, except the voter now in dispute, who was of Roscat. Then the notes of the last election Committee, taken by the clerk of the House of Commons, show that John Kelly of Roscat, was the voter struck off by the House of Commons. All that the petitioners are called on to prove is, that this voter, John Kelly, was struck off, whose vote was litigated before the former Committee.

Mr. *Maule*, in reply, said, he would assume that the Committee considered the production of the poll book material, from their having required a fresh inquiry into the cause of its absence. In making this assumption, he did not necessarily impugn the former decision of the Committee; for the Committee may have considered, that in the former cases the non-production of the poll book

1837. was admitted to have been sufficiently accounted for to let in secondary evidence. But, as the Committee had now called for an account of its non-production, and that inquiry had proved completely unsatisfactory, it must become clear to the Committee, that no secondary evidence could be admitted. But, even if the notes of the proceedings before the last Committee are admissible, those notes do not state that John Kelly, whose name was struck off, was John Kelly of Roscat.

Resolved.—“That the vote of John Kelly be struck off the poll.”

Four other votes were then struck off by consent.

WILLIAM KELLY'S CASE.

There were two William Kellys on the poll, both of whom had been struck off by the former Committee, but one of whom had been re-registered on the 26th of June, 1836; the other on the 23d October, 1836. The latter was the one intended to be objected to; but the following entry was made in the poll book opposite to the name of the voter actually objected to, “registered 26th June, 1836.”

Evidence
not allowed
to contra-
dict the
description
of a voter
on the poll
book.

Mr. *Rushton* objected to this vote being gone into, as the description on the poll book showed that this case was the same as that of John Allen, which had already been adjudicated upon.

Mr. *Thesiger* contended, that the entry on the poll book was not conclusive evidence, as the entry was not material. But the Committee might hear evidence to show that the entry was inaccurate.

Resolved.—“That the petitioners may not proceed in this case.”

This closed the List No. 6. Thirty-four votes out of thirty-five having been struck off from the list.

1837.

HUGH NOWLAN'S CASE.

Mr. *Thesiger* then proposed to add the vote of Hugh Nowlan of Newtown to the poll for the petitioners.

The following is an extract from that part of the statement delivered in by the petitioners, which applies to the vote of Hugh Nowlan.

“ That the petitioners against the return will seek to have put on the poll for the said Thomas Bunbury, the vote of Hugh Nowlan of Newtown, a duly qualified elector, which was duly tendered and given at the said election for the said Thomas Bunbury, on the first day of the said election, but which was afterwards, on the last day of the said election, by the said sheriff, improperly rejected and struck off the poll ; and will show that the said Hugh Nowlan was duly registered and entitled to vote at the said election.”

Mr. *Rushton* objected, that the description of Hugh Nowlan's vote was not made with sufficient distinctness in the statement delivered in by the petitioners, on the ground that the name of the barony was not added to the description ; he relied on 42 G. III. c. 106, s. 3, and 47 G. III. c. 14, s. 4.

Resolved—That the objection be overruled.

Evidence was then produced of the circumstances under which Hugh Nowlan's vote had been struck off; from which it appeared, that the voter's qualification was situate in the Barony of Idrone East, but that he was improperly described in his certificate as of the Barony of St. Mullens ; that he had polled for Mr. Bunbury on this certificate in the Idrone East booth, and had been objected to. The person who saw him vote did not know the ground of the objection ; but the barrister who argued on behalf of Hugh Nowlan's vote, before the assessor, proved the objection to have been

In the statement handed in by the petitioners, the name of the Barony was not added to the description of a voter. Held immaterial.

1837. on the ground of the defect of the certificate. It was also proved, that the objection had been argued before the assessor, and decided by him to be a valid objection; and that the assessor indorsed on the objection paper, "Reject this vote." That the assessor was then requested, on behalf of the voter, to allow him to withdraw his certificate and poll upon his affidavit, in which the barony was correctly stated. That the assessor had expressed his opinion, that the voter could not do this; and said that he should hold the voter to the document which he had first produced. The voter did not go back to the booth and demand to vote on his affidavit, but his name was by mistake placed on the poll, and included in the return of the day by the deputy sheriff: this occurred on the 15th of February, the first day of the election; on the 18th of February, being the day on which the poll closed, and about the time of the close of the poll, after the numbers were cast up, but before they were declared, the vote was struck off the poll, in obedience to a written request from Mr. Vigors, made by him at the instance of the assessor.

An affidavit from the deputy sheriff was also read in evidence, in which it was sworn, that the insertion of Hugh Nowlan's name on the poll had been made by mistake.

In the course of the evidence it was attempted to be shown, that in another case the assessor had allowed a voter for Mr. Vigors to fall back upon his affidavit, after his certificate had been held bad.

Mr. *Maule* objected to the introduction of evidence of the conduct of the sheriff in other cases, whilst Hugh Nowlan's vote was under discussion; and after argument it was resolved:—

"That evidence of the decision of the assessor, in the case of another vote, is not admissible in inquiring into the

case of Hugh Nowlan." (1) Evidence was also ad- 1837.
 duced of the conduct of the assessor in striking off Hugh
 Nowlan's vote.

Mr. *Maule* here inquired whether the Committee did not mean, by their last decision, to exclude all inquiry into the conduct of the Assessor; but the chairman stated, that "The conduct of the assessor, so far as it affected the vote of Nowlan, was not excluded by the decision of the Committee."

Mr. *Thesiger* also read part of the statement of the high sheriff, in which he gave the following explanation of the removal of the vote—"The high sheriff will show the fact to be, that the deputy had made a mistake in casting up the poll book, and had reckoned one of the voters who had voted for Vigors, as though he had voted for Bunbury."

Mr. *Maule* called a witness to show that this part of the sheriff's statement was erroneous, having been prepared on behalf of the sheriff, in a hurried manner, from imperfect notes of the proceedings. He also called Mr. Keogh, the high sheriff; but

Mr. *Thesiger* objected to his being examined, on two grounds.

First—His having been in the room during part of the discussion.

(1) There is an inaccuracy here in the Minutes of the Evidence printed by order of the House of Commons, in the omission of the word "not" from the resolution. See Minutes of Evidence, p. 47. The Minutes are, in the main, so remarkably accurate, that I should have almost doubted the correctness of my own note, if there had been nothing to confirm it. But it is obvious, from the Minutes themselves, that evidence of the decisions of the assessor on other votes was not in fact gone into. Again, the subsequent inquiry of Mr. Maule, and the answer of the Chairman, show that some limit had been placed on the inquiry into the assessor's conduct. There are also other circumstances which enable me to rely with confidence on my own note of the resolution.

1837. **Second**—The propriety of his own conduct being the matter in dispute.

Mr. *Maule* denied Mr. Keogh's having been present to such an extent as would exclude him ; and contended, that it was not his conduct, but the right of the voter to be on the poll, which was the matter in dispute.

The witness was then examined on the point of his having been in the room ; and it appearing that he had been in the room during some part of the discussion, the Committee resolved—"That he should not be examined."

Mr. *Maule* then addressed the Committee, and contended, that the vote of Hugh Nowlan of Newtown could not be placed on the poll.

In the first place, there is a technical objection on account of the omission of the name of the Barony ; for there are two Newtowns in Carlow County, one in the Barony of Idrone East, the other in the Barony of St. Mullens. But if he should waive the technical grounds and consider the case on its merits, the claim is to put on the poll a person who now is not on the poll.

To support the claim, it must be shown, that the voter did every thing which was necessary to entitle him to be placed on the poll.

The claim is, that the vote was duly tendered and given for Bunbury, on the first day of the poll ; and this claim must be supported completely, for no part of the statement of the claim is immaterial. It would be easy to point out the mode in which the petitioners had failed in sustaining their claim.

In the first place, the insufficiency of the proof of identity is one essential failure in the proof of the case. The evidence is, that a person came to the polling booth of Idrone East, describing himself as Hugh Nowlan, of Newtown, in the Barony of Idrone East, and tendered

Where a vote, which the assessor had decided to be bad, had been placed on the poll by mistake, and had been subsequently removed from the poll by the sheriff after its final close, the Committee refused to replace it on the poll.

a certificate, in which the voter was described as Hugh Nowlan, of Newtown, in the Barony of St. Mullens. 1837.
There is no evidence that the person who came up to the booth was Hugh Nowlan, of Newtown, in the Barony of Idrone East. There is an affidavit shown of Hugh Nowlan, of Newtown, in Idrone East, but there is no evidence that the person who produced the certificate, and swore in that affidavit that he was the person described in that certificate, namely, Hugh Nowlan, of Newtown, in St. Mullens, was in fact Hugh Nowlan, of Newtown, in Idrone East; the first oath in schedule B of the Irish Reform Act, requires that the voter producing the certificate, should swear that he is the person described in the certificate. Hence, the person who produced the certificate must have sworn himself to be Hugh Nowlan, of St. Mullens, and they give no evidence to show that he was in fact Hugh Nowlan, of Idrone East.

2nd.—But even if the identity is proved, the person who produced the certificate from St. Mullens, in the Idrone East booth, was objected to in the booth; the objection was taken before the assessor, and argued upon and decided against the vote on the 15th of February, the first day of the poll; from that moment the vote of Hugh Nowlan ceased to be a valid vote, and the vote ought to have been instantly struck off. It appears, however, that the vote was not instantly struck off. What then was the duty of the sheriff when these facts came to his knowledge? Unquestionably to strike the vote off the poll. Section 28 of the Irish Reform Act provided, that the certificate shall be the proper evidence, and in the absence of the certificate, the affidavit may be given in evidence on demand of the party. Here there was a certificate, and therefore the affidavit was not admissible; but even if it were admissible, there was no demand. Section 30 provides for cases of no certificate, viz. that

1897. the affidavit may be used on demand of the voter. Now as to what took place before the assessor, the whole question was, whether the vote was good which had been given on the certificate; and the assessor, unquestionably, decided rightly on that objection. An application was afterwards made to the assessor, to allow the voter to poll on his affidavit; and the assessor decided, and rightly decided, that as the voter had elected to vote on his certificate, he could not afterwards use his affidavit. If the voter could have voted again on his affidavit, after having voted on his certificate, he might have voted for Vigors; so that he might have voted twice at the same election; and because of a technical defect in the first exercise of his franchise, he might have exercised it afresh, and have had a fresh option. But if Mr. Walsh were wrong, still the voter did not demand to vote on his affidavit—he did not tender himself to vote a second time; and, in order to enable the Committee to put the vote on the poll, he must have been duly tendered. Supposing that Mr. Walsh misled the voter by expressing an opinion, and thus prevented him from tendering himself, certainly the Committee could not on that ground put him on the poll. Even if the voter had been prevented from tendering himself by being imprisoned, the House of Commons could not order his name to be placed on the poll.

He contended, that both the decision of the assessor, and the opinion which he gave, were right.

1st. The assessor decided rightly not to receive the vote on the certificate.

2nd. He gave his opinion rightly, that the voter could not vote a second time on his affidavit.

The first adjudication was properly indorsed on the objection paper by the assessor, and ought to have been obeyed by the deputy. By a blunder, the adjudication was not acted upon. The vote of Nowlan, at the end of

the first day's poll, was reckoned in the total of that day's poll; but at the end of the whole election, the vote was deliberately omitted. The assessor hesitated to act as a volunteer in omitting it, and for that purpose informed Mr. Vigors, that he could not omit the bad vote, unless requested by him. There was no need of such a request, but it was prudent, and business-like to require it. The request was made, it was acted on, and the vote omitted. And is it a crime in the sheriff, that he acted upon the adjudication of the assessor, and struck off a vote which the assessor had decided to be bad? Suppose the sheriff had kept the vote on the poll, the facts proved before the Committee by the petitioners would have been sufficient to have made the Committee strike off that vote.

Mr. *Thesiger*.—If Hugh Nowlan's vote is not placed on the poll by the Committee, they will put every election in the power of the sheriff and assessor. As to the statement not containing the name of the barony, the Committee have already decided that the statement is sufficient.

As to the question of identity, the voter's description on the poll book is Hugh Nowlan, of Newtown, registered 27th October, 1832. There is the same description in the affidavit, the same description in the certificate, except the error in the name of the barony, "St. Mullens" being put by mistake instead of "Idrone East."

A witness has stated, that he saw the voter, Hugh Nowlan, of Idrone East, come to vote; the objection has also been proved, and the objection was not to the voter's identity, but to the error in his certificate. There is no doubt, there never has been a question as to the identity, and no such question can now be raised. The only question for the decision of the Committee is, whether

1837. the assessor was right in the course he adopted. The case of the petitioners is, that Hugh Nowlan appeared in his proper barony of Idrone East, his qualification being in Idrone East, and there produced his certificate. It is true that there was a slight error in the certificate : but is every error in the certificate fatal? Observe, the voter is a marksman, his affidavit is correct, and the certificate ought to correspond with it, but it does not. It is provided by the Irish Reform Act, 2 and 3 W. IV. c. 88, s. 28, that the clerk of the peace shall give to the voter a certificate, and that the clerk of the peace shall make an entry of such certificate at the foot of the voter's affidavit. Here there has been a compliance as to the affidavit, and as to the certificate at the foot of the affidavit ; but the certificate given out to the voter contains, by the mistake of the clerk of the peace, the name of a wrong barony. There is every probability that the voter did not know of the mistake ; but even if he did, is the voter concluded by the certificate? If so, then the clerk of the peace has the power of disfranchising, by introducing an error into the certificate. The error is not of such a kind as would invalidate the certificate, and the vote may be reviewed on the voter's swearing that he was the person mentioned in the certificate. But if the certificate was invalid, then it was void, or it was equivalent to none, and the affidavit was admissible. 60 G. III. and 1 G. IV. c. 11, s. 10, provides, that if the voter produces an inaccurate certificate, it shall and may be lawful for the returning officer's deputy, and he is thereby required, to direct the deputy clerk of the peace to produce the original affidavit or affirmation of the registry of the freehold of such person so tendering his vote, or offering to poll.

Again, 2 and 3 Wm. IV. c. 88, s. 54, requires the certificate, or in default of its production, the original affidavit.

The *Chairman* here called Mr. Thesiger's attention to the remainder of section 54, requiring the returning officer to admit such person to vote "upon the production of such certificate or affidavit by such person." And also to section 30, which requires, "that in those cases, wherein a certificate of registry shall not be produced by the person tendering his vote, or offering to poll, such deputy shall, on the demand of the person offering to poll, produce the original affidavit, or affirmation, of the registry of such person."

1837.

Mr. *Thesiger* contended, that section 30 was an enabling section, applying only to the case in which the voter is not provided with his certificate, and enables him in such a case to compel the clerk of the peace to produce his affidavit. The case of Hugh Nowlan was very different; he had with him his certificate, he did not stand in need of the enabling clause; all that was necessary for him to do was, to show the error which the clerk of the peace had made in his certificate. The production of his affidavit would have been sufficient to have corrected this error; but the production of the affidavit was refused by the assessor, who said he should hold the voter to the document which he had first produced.

It was not necessary for the voter to tender himself again to poll upon his affidavit. The vote of Hugh Nowlan having been objected to, the mere tender of his vote for Bunbury in the booth, was only one step in the process of his giving his vote. Before he could actually vote, that is, before he could be entitled to have his name placed on the poll, the objection which had been taken to his vote must have been heard, and decided in his favour. By 60 G. III. and 1 G. IV. c. 11, s. 12, it is provided, that in case of a voter being objected to at the poll, "the inspector who shall have made the objection on behalf of any candidate, shall instantly write down a me-

1837. morandum, on a printed form, to be provided by the returning officer, containing the name of the voter, the place of his abode, and the nature of the objection or objections, and sign and date the same; and shall give the same to the returning officer's deputy, who shall sign the same, with the initial letters of his name, and then give the same to the assistant deputy clerk of the peace, who shall take the same, together with the certificate, or affidavit, or affirmation of registry, if it shall be necessary so to do, to the returning officer, to decide on the validity, thereof." The assessor is to decide on the objection, and to write on the objection paper, either the words "allow this vote," or the words "reject this vote." If the vote is allowed, the direction for its allowance is to be delivered to the deputy of the clerk of the peace, who is to take it to the poll clerk, and the poll clerk is then to enter the vote, and on his so entering it, and not before, the voting is completed.

The ground on which the petitioners now seek to place the vote on the poll is, that the assessor was wrong in deciding to reject the vote. It is clear that he would have been wrong, if the affidavit had been before him; and by section 12, the affidavit ought to have been before him, if it was necessary. And in the case of Hugh Nowlan, the decision was made, on the ground, that if the affidavit had been before the assessor, he would still have rejected the vote. The conduct of the assessor, in refusing to allow the voter to fall back on his affidavit, and in saying, that he should hold the voter to the document which he had first produced, dispensed with the necessity of a formal demand of the affidavit by the voter. On this point, the evidence which has been given before the Committee by Mr. Hayes, the barrister who argued before the assessor on behalf of Hugh Nowlan, is very material. Mr. Hayes' evidence is as follows:—"I pressed on the

assessor the right of the party to vote on his affidavit, on which the barony was rightly stated, and that was the point which was ultimately decided." The decision of the assessor was virtually, that the voter had no right to fall back upon his affidavit, even if that affidavit had been before him. That decision was clearly erroneous, and the petitioners now called on the Committee to reverse it. 1837.

It was admitted on all sides, that Hugh Nowlan was as good a vote as any on the poll ; he had a right to vote on his affidavit, if his certificate were erroneous ; nay more, even on the certificate itself, he had a right to vote, notwithstanding the clerical error which it contained.

But, in addition to these grounds on the merits, he would offer the following technical objection to the mode in which the vote had been struck off. The vote of Hugh Nowlan was included in the totals of the first, second, and third day's polls. His vote was struck off on the fourth and last day of the poll, after the poll had finally closed. Now, even if Hugh Nowlan's vote had been a bad vote, even if it had been left on the poll by accident, the assessor had no power of striking it off after it had been included in the first three days' poll. The only enactment which provided for taking improper votes off the poll, is 4 G. IV. c. 55, s. 56; but that section does not apply to elections for counties, but only to those for counties of cities and counties of towns, and even in those cases, it only provides for the vote being taken off before the closing of the poll. By 2 and 3 Wm. IV. c. 88, s. 52, it is enacted, that on the last day of polling, the poll shall finally close at or before five o'clock in the afternoon ; and although there is some slight difference in the evidence, as to the exact time when the poll closed, yet all the witnesses agree, that it was after five o'clock.

Resolved—That the vote of Hugh Nowlan be not placed on the poll.

1837.

JOHN NOWLAN'S CASE.

The following List was then handed in.

LIST No. 3.

List of persons whose names appear on the poll for Nicholas Aylward Vigors, Esq. at the last election for the county of Carlow, and each of whom the petitioners will contend and insist should be struck off the poll, in consequence of the qualifications under which their names had been inserted on the register, not continuing the same or sufficient at the time of the election.

Statement
in the head-
ing of a list
that a vo-
ter's quali-
fication did
not con-
tinue the
same, with-
out show-
ing how it
was varied,
held suf-
ficient.

Mr. *Maule* objected to the heading of the list. By 47 G. III. c. 14, s. 4, the specific and particular ground of objection against each voter objected to is required to be specified and particularized; and no evidence can be adduced before the Committee of any ground of objection, other than the one so specified and particularized. Also, by 42 G. III. c. 106, s. 3, by which provision is made for an interchange of lists objections, all grounds not stated in those lists are excluded from the inquiry. In the present instance, the statement of the objection is not sufficiently specific and particular. If the objection intended to be raised is, that the party had not, at the time of voting, the qualification on which he was registered, the statement of the objection ought to have gone further, and stated whether the voter had ceased to occupy, had sold the whole or part, or surrendered or charged the tenement, or forfeited his qualification by felony, or become insolvent, or varied his qualification in any other manner.

Mr. *Thesiger*.—The object of the enactment which has been cited was twofold. 1st—To give notice to the voter of the objection which he will be called on to answer. 2nd—To limit the inquiry, by confining the par-

ties to the particular objections of which they have given notice. Both these objects will be satisfied by the present statement of objection; and the evidence by which the objection will be supported, will be by showing, that the voter has parted with a part of his qualification since he was registered. 1837.

It is sufficient in the heading of the list to state the nature of the objection, without entering into the proof by which the objection is to be sustained. To hold the present statement of objection insufficient would be to confound proof and objection.

Mr. Maule in reply.—The present statement of objection contains the nature, but it does not contain the grounds of the objection. There is no danger of the grounds of the objection being confounded with the proof, for no one has ever supposed that the proof of the objection need be set forth in the statement. The only matters which are required to be stated by the Act of Parliament, are the grounds of the objection, and those are omitted. If the present heading is sufficient, the petitioners would be able to go into several distinct grounds of objection under the same heading, which is a strong argument to show that the heading is not sufficient.

Resolved—That *Mr. Thesiger* be allowed to proceed with his case (1).

The affidavit of *John Nowlan*, of *Killane*, in the

(1) After the decision was pronounced, *Mr. Thesiger* stated, that there were decisions in the Court of King's Bench on notices of grounds of appeal under the Poor Law Amendment Act, confirmatory of the decision of the Committee. *Mr. Thesiger* probably alluded to the case of *R. v. J. of Cornwall*, 1 N. and P. 144, where the ground of appeal, with respect to the children of a pauper, was stated to be, that they "are and each of them now is settled in the parish of *Penryn*," which was held sufficient; and *R. v. Kelvedon*, 1 N. and P. 138. It is proper, however, to observe, that the authority of those cases has been much shaken by the decision of *R. v. J. of Derbyshire*, 1 N. and P. 703, in which latter case a statement that the pauper had gained a settlement in the parish of *A* by hiring and service, was held insufficient.

1837. Barony of Forth, was then put in and read: it was dated the 20th of April, 1826. The qualification stated in the affidavit was a freehold house and land of the clear yearly value of £20 above all charges. A certificate of registry was also read, dated 14th November, 1832, and entered upon the affidavit. A deed was then put in, dated 6th of May, 1801, whereby 40 acres of land were demised to one Patrick Nowlan, for three lives, or thirty-one years, which was the foundation of John Nowlan's title.

Another deed, dated 15th March, 1834, was put in, by which, after reciting a demise of 27 acres, parcel of the said 40 acres, from John Nowlan to Michael Doyle for 21 years, from the 25th March, 1824, the residue of the said term of 21 years in the said 27 acres, was assigned to Terence Cummings. A witness was then asked if he had ever heard John Nowlan say what had become of the other 13 acres.

Declarations of a voter received in evidence against the sitting member, although they related to the title to lands, & there had been no notice to produce title deeds.

Mr. *Maule* objected, that declarations of John Nowlan were not evidence against the sitting member. He was aware that in some cases, a distinction had been drawn between the declarations of a voter made before the poll and after the poll: but in the Monmouth case (1) that distinction was held to be untenable. But even if the voter's declarations were held to be admissible, there ought to have been a notice to John Nowlan to produce his title deeds before his declarations as to his title could be given in evidence. Hence, without entering into the general question, as to whether the declarations of voters were admissible or not, he should rest his objection on the simple ground, that the question being one of title, notice to produce the title-deeds must precede evidence of declarations.

Mr. *Thesiger*.—In the Southampton case (2) it was

(1) MSS. 13th July, 1831.

(2) C. and R. 113, P. and K. 222.

held, that evidence may be given of the declaration of a person even after voting, though it may tend to affect him with penal consequences; the dividing point was there made at the time of striking the ballot. In the Ripon case,(1) the voter had stated to two persons, in the months of June and July 1832, that he had no vote, and that his aunt was the tenant of the house: the election took place in the beginning of 1833, and the declarations were held admissible. 1837.

A voter who has voted for the sitting member, is always considered as a party, and it is on that ground that his declarations are admissible. The question is always considered to be between the voter and the party questioning his vote, and not merely between the sitting member and the petitioner.

As to the objection, on the ground of the absence of a notice to produce, the object of the present question is to show, that the voter has now no deed, and if that is the case, a notice to produce his title deeds would have been useless.

Mr. *Maule*.—The distinction between the period of the declaration of the voter being before or after the ballot, is not supported by reason, or by any principle. But it is not necessary to enter into the general question of the admissibility of declarations, since the matter contained in the question put to the witness is not the subject of declarations.

The Speaker being announced at Prayers, the Committee then adjourned, without having come to a decision. On their meeting again, it was—

Resolved—That the evidence be received.

The *Chairman* then said, that the Committee had desired him to state, that one of Mr. Maule's objections

(1) P. and K. 210, 1.

1837. appeared to them to have considerable weight; but that having, since the last adjournment, made inquiry into the practice in courts of law, and having found that the point was disputed, and the practice not uniform, they had thought it best to receive the evidence, subject to any observations that might be made upon it, rather than exclude it altogether.

The examination of the witness was then resumed; and he stated, that John Nowlan had told him, that he had been in debt to Cummins, and had given over to him the other 13 acres, and that John Nowlan was not in possession of more than a quarter of an acre of the land. It appeared on his cross-examination, that he was a solicitor; that Cummins was a client of his, and had been for six or seven years; and that he was the solicitor who prepared the deed of assignment of the 27 acres to Cummins, but that he had never prepared any deed of assignment for the 13 acres; that John Nowlan voted at the election in 1835.

Mr. *Maule*, in support of the vote, observed, that the voter was registered in 1832, and the only question was, whether he had, since that time, parted with his qualification; for it was not contended that the thirteen acres were not worth £20 a year. If there were any deed from John Nowlan to Cummins of the 13 acres, it would be produced, for the witness produces the deed from John Nowlan to Cummins of the 27 acres which his client Cummins has entrusted him with; hence it is fair to presume, either that there is no deed of the 13 acres, or that if produced it would not disfranchise John Nowlan.

No such deed is produced, nor is Cummins produced, to whom the conversation relates.

The loose evidence of the conversations between John Nowlan and the witness could not be considered sufficient

to disfranchise John Nowlan, or to satisfy the Committee that John Nowlan had twice perjured himself, viz. at the election in 1835 and again at the last election. 1837.

Resolved—That John Nowlan's vote be allowed.

PATRICK RYAN'S CASE.

List No. 5 was then handed in, the heading of which was as follows: "List, containing the name of a voter for the said Nicholas Aylward Vigors, whose vote is bad, he having taken the benefit of, and been discharged under, the Acts of Parliament for the Relief of Insolvent Debtors in Ireland; and the interest in the lands and tenements in respect of which he claimed to register (and did register and vote at the said election), was thereby legally assigned by virtue of the said Acts of Parliament, after the said registration, and before and at the time of the said election."

The name of the voter in this list was Patrick Ryan.

Mr. *Austin* having examined the witnesses, proceeded shortly to state the facts on which he relied in his application for the removal of the vote from the poll. The discharge of the voter, under the Irish Insolvent Debtors' Act in 1834, has been proved by the production of the attested copy of the petition, schedule, assignment, and adjudication, which have been examined with the originals in the custody of the proper officer. The witness who produced these copies himself saw the insolvent sign his original petition, schedule, and assignment, and was in court when the insolvent obtained his discharge by a judgment of the Insolvent Court.

Insolvency subsequent to registration disqualifies a leaseholder from voting for a county, although he remains in possession, and the assignee has not in any way interfered.

The same witness proves, that the signature to the affidavit of registry, on which the vote was given, is the handwriting of the insolvent. This is conclusive evidence that the person registered on that affidavit has been discharged under the Insolvent Act. The only other question of fact

1837. is, whether the registry was previous or subsequent to the insolvency. And on this point there can be no dispute; for the discharge under the Insolvent Act was in 1834, and the registry was in 1832, as appears by the affidavit on which the vote was given, by the register, and by the poll book. The only remaining consideration is whether, in point of law, insolvency disqualifies a voter. Now, by the Irish Insolvent Act, 1 and 2 G. IV. c. 59, s. 8, an assignment is required, which vests all the property of the insolvent, real and personal, in the provisional assignee. In the present case such an assignment was executed, and consequently all the interest of the voter in his freehold was determined. In the case of *Doe d. Palmer v. Andrews*, (1) it was held, Best. C. J, dis. that the interest of an Insolvent Debtor in premises held by him from year to year, under an agreement for a lease, passed by the assignment to the provisional assignee, so as to prevent the insolvent from maintaining ejectment against his tenant, although no act had been done by the provisional assignee to show his acceptance or refusal of the lease, and no other assignee had been appointed. Again, in the case of *Topham v. Dent*, (2) the plaintiff, whilst in prison for debt, assigned all his effects to the provisional assignee, and was afterwards discharged as an insolvent. During the imprisonment, the defendants broke open the house, no one being within, in an attempt to distrain for rent. When the prisoner went to prison, he left his wife in the house, but she had been absent three days when the trespass was committed. And it was held, that the interest in the house being vested in the provisional assignee by the assignment, the plaintiff could not maintain trespass, unless it could be shown that his wife had continued in possession with the assent of the assignee. There was also a Parliamentary decision in point, in the case of

(1) 12 Moore, 601. 4. Bing. 348. 2 C. and P. 593.

(2) 6 Bing. 515. 4 M. and P. 264.

Downe's vote in the late Dublin case, (1) where the voter had executed an assignment to the provisional assignee and afterwards voted. Upon that occasion, the question was argued at great length on both sides, and the votes of Downe, and ten others similarly situated, were struck off, on the ground of their insolvency. 1837.

Mr. *Maule*.—The question is, whether enough has been proved to disfranchise Patrick Ryan who was registered in 1832, and from that time to the present has continued in possession of the same freehold on which he was so registered. If the debts have all been paid, then the undisturbed possession of the freehold which Patrick Ryan has been permitted to enjoy is accounted for, and in that case he has at least an equitable title to the property on which he resides. The case which has been cited as to the right to bring ejectment, does not apply, for ejectment cannot be brought on an equitable title, but an equitable title is a good qualification for a voter. Patrick Ryan swore at the poll, that his qualification continued; and such oath is perfectly consistent with the case which has been made out against him.

It is well known that leaseholds are often a *damnosa hereditas*, and the assignee of an insolvent may elect whether he will take to the lease or not; and here the question is not one of value, but of continuance of title. If the assignee does not elect to take the lease, the lessor may elect to turn out the lessee, or he may continue the insolvent as his tenant. In the case of *Doe d. Palmer v. Andrews*, Best, C. J. dissented. And from the judgment in that case, it is clear, that if the question had been on a lease instead of an agreement, the judgment would have been unanimously in favour of its having remained in the insolvent. In *Topham v. Dent*, the action was trespass for entering into the house and taking the goods. The goods were clearly the property of the assignee, so that there could

(1) M.SS.

1837. be no pretence for a trespass for taking those goods. Also as to the house, the jury found that there was no possession, and the Court held that they decided rightly. Here Patrick Ryan is proved to have been in possession up to the time of giving his vote. In the Worcester case (1) there was no evidence to show that the assignees had done any act whereby they elected to take the lease, and the bankrupt's qualification was held to continue. With regard to the Dublin case, the vote of John Hylam, an insolvent, would be found to have been allowed under circumstances similar to those of Patrick Ryan. In the present case, it must be inferred, in the absence of evidence, either that the assignee did not make his election, or that by consent of the creditors, or liquidation of the debts, the insolvent was allowed to remain in possession under an equitable title.

Mr. *Austin*.—There were two classes of voters in the Dublin case, the town voters and the voters of the county of the city of Dublin. The town voters were allowed; the voters for the county of the city were disallowed. The case of John Hylam, which has been referred to, was the case of a town voter. On the question being argued on Downe's vote in the Dublin case, who was a leaseholder and a voter of the county of the city, the Committee held the voter disqualified; and the circumstances of Downe's case were precisely similar to those of Patrick Ryan's.

In the case of a freehold qualification there must be title to give a vote, but title is not necessary in town cases, if there is actual occupation. The Worcester case is a town case; it was also distinguished from the present, by having been under the Bankrupt Act instead of the Insolvent Act.

Resolved—That the vote of Patrick Ryan be struck off the poll.

(1) K and O, 241.

Mr. *Thesiger* then proceeded to List No. 4, of which the following was the heading: "List of persons who were improperly allowed to be registered, and to vote as freeholders for Nicholas Aylward Vigors, Esquire, at the last election for the county of Carlow; to each of whom it is objected, that the lessor or grantor of the lease to him, had not in him a title to grant a freehold lease, being possessed of chattel interest only; and, secondly, that the estate for which he was registered, did not entitle him to be registered as a freeholder."

1837.
Where a voter is registered, on an alleged freehold, the Committee will not inquire whether the lessor who granted the voter's lease, had himself a freehold estate in the lands at the time of the grant.

Mr. *Maule* objected to this list being gone into, as such a course would be, in effect, to open the register, which the Committee had previously refused to do.

Mr. *Thesiger*.—The Chairman having already intimated that the resolution of the Committee did not go to the extent of deciding that, under no possible circumstances could a Committee open the register, it is competent for the petitioners to endeavour to open it in such a case as the present. The nature of the objection was such that, by the Irish Reform Act, (1) s. 16, there were no means of inquiring into it at the registry. The objection was, that the landlord under whom the voter claimed, had himself only a chattel interest, and therefore could not grant a freehold lease. And at the end of section 16, after provision has been made for the proceedings at the registration, it is further provided, that no person shall be bound to produce the title-deeds of any landlord, under whom he may hold or derive, or make proof of such title, and that possession and perception of rent shall be deemed *prima facie* evidence of such landlord's title. By 4 G. IV. c. 55, s. 56, it is provided, that if any person shall be admitted to poll at any election for a county of a city, or county of a town, who has polled by virtue of a registry of an alleged freehold under a lease of lands or tenements for a life or lives, made by a lessor

(1) 2 and 3 W. IV. c. 88.

1837. who had not, at the time of making the same, a freehold estate therein, it shall be lawful for the returning officer, upon the complaint of any candidate, to take the vote of such person off the poll, at any time before the final closing of the same. Can it be said in a case, in which, if the objection were made before the returning officer, he might remove the party from the poll, a Committee of the House of Commons is precluded even from making an inquiry? If there is any possible case in which the Committee would open the register, the present appears to be that case.

Mr. *Maule* apprehended, that the decisions come to by the Committee, in the particular cases which had been before them, amounted to this, that the certificate is conclusive of the right of the party to be put on the register, at the time he is so put on.

The *Chairman* said, that when he made the observation, (1) that the Committee had not decided, that in no possible case, and under no possible circumstances, could the register be opened, he had in his mind the case, certainly a most improbable one, of an assistant barrister having corruptly given his decision for a bribe.

Mr. *Maule*.—Probably, even in such a case, it would not be wise for a Committee to take upon itself the power of reversing a decision of a court of competent authority, unless they had a legal right to do so. It would be better to call for the interposition of the Legislature to reverse such a decision by Act of Parliament.

But there is no analogy between such a case and the present; the Committee have already, by their resolutions, established as a principle, that they cannot inquire whether the assistant barrister has decided rightly, and those resolutions are applicable to the present subject. It is a mistake to suppose that the assistant barrister has no means of inquiring into the objection at the registry. There is

(1) *Supra*, p. 49.

nothing in section 16, to prevent the assistant barrister from inquiring into the title of the landlord, it only provides that it shall be sufficient for the voter to make out a *prima facie* case of title in his landlord, but does not exclude the most ample inquiry. 1837.

Mr. Theisiger.—There is no power to summon witnesses.

Mr. Maule.—No such power is wanted. There is never any lack of willing witnesses to assist in the disfranchisement of a voter. With regard to the provisions contained in 4 G. IV. c. 55, s. 56, for striking names off the poll, by the returning officer, before the close of the poll; those provisions never were applicable to counties, but only to counties of cities and counties of towns, and, even with respect to these, the provisions are repealed by the Irish Reform Act (1). For by section 54, the certificate is made conclusive. Besides, that mode of inquiry, even whilst it was in force, only was applicable to the poll.

Resolved—That the Committee will not open the register as to List No. 4.

Mr. Theisiger then stated, that he had succeeded in striking off 35 votes from Mr. Vigors's majority of 36; and that, as he had exhausted all his lists of objected votes, he was obliged to give up the case, as far as scrutiny was concerned, and that it only remained for him to show, that the charges against the sheriff were not frivolous or groundless.

The charges against the sheriff were then gone into.

On the 8th May, 1837, the Chairman brought up the Report, and informed the House, that the Committee had determined,

That Nicholas Aylward Vigors, Esquire, was duly elected.

That the petition of Walter Newton and others was not frivolous.

That the opposition of Howard Moore and other

(1) 2 and 3 W. IV. c. 88.

1837. electors, admitted to defend the return of Nicholas Aylward Vigors, Esquire, was not frivolous.

That the petition of Walter Newton and others, so far as regarded the sheriff, was not frivolous.

That the opposition of the sheriff was not frivolous.

That the Committee had altered the poll taken at the election, by striking off the names of John Coady and others.

And that the Committee had likewise struck off the poll, (1) the vote of Patrick Ryan, of Tullow, Rathvilly, No. 294 on the poll, who having been registered, voted at the said election, but who, subsequent to the said register, and before the time of the election, had become disqualified by reason of his having been discharged under the Insolvent Acts.

(1) The reason for distinguishing the vote of Patrick Ryan from the others which were struck off the poll, was in order that the House of Commons might have it in their power to remove his name from the register. But as no motion was brought forward for striking his name off, it was allowed to remain on the register.

APPENDIX

TO

THE CARLOW CASE.

Containing the Arguments and Decision on the Sheriff's Application to join in striking the List of the Committee.

When the parties were called in, previously to the ballot for the Committee, Mr. Thesiger and Mr. Austin having answered, that they appeared for the petitioners, and Mr. Rushton, that he appeared for the sitting member, Mr. Maule said, that he appeared on behalf of the returning officer; and he stated that it became necessary for him, before the House proceeded to the ballot, to claim on behalf of the sheriff of Carlow, for whom he appeared, a right to interpose in striking the Committee under 9 G. IV. c. 22, s. 36. He contended, that under the form of the present petition, the sheriff being a party complained of upon distinct grounds, was entitled to appear as a separate party, and ought to be allowed to strike the list as a party.

The sheriff was not allowed to interfere in striking the Committee, although the petition contained charges against him.

He then read the 36th section, which provides, "That the returning officer by whom any return ought to have been made, or has been made, shall attend the House when any petition complaining of any undue election or return, or omission to make a return, is ordered to be taken into consideration; and the House shall determine, from the nature of the case, whether the returning officer, together with the petitioners, be entitled to strike off from the list of members drawn by lot," and he referred to section 33, by which it is enacted, "That if, on a complaint of petition of an undue election or return, there shall be more than two parties be-

1837. fore the House on distinct interests, or complaining, or complained of upon distinct grounds, whose right to be elected or returned may be affected by the determination of any such Select Committee, each of the said parties shall successively strike off a member from the thirty-three members chosen by lot, until the same number be reduced to eleven;" and he contended that it was the duty of the House to determine, from the nature of the case, and that the House ought to inquire into the allegations of the petition. He then proceeded to examine the allegations against the sheriff contained in the petition.

1st. Improper conduct of the sheriff in selecting as his assessor a member of the General Association, without giving Mr. Bunbury an opportunity of objecting.

2nd. That the sheriff and assessor neglected to remove a deputy who had been guilty of partiality.

3rd. That the sheriff improperly refused to place on the poll, persons who were duly qualified to vote.

4th. That the sheriff placed on the poll persons who were not qualified, and who did not produce certificates of registration, or affidavits of registry, although the names of such particular persons had, by course of law, been struck off, by virtue of the warrant of the Speaker of the House of Commons.

5th. That such persons were placed on the poll by virtue of the registry prior to the warrant of the Speaker, and the report of the Committee, which registry the said report declared to be null and void.

6th. That notwithstanding the report and order and erasure of names, and notwithstanding certified copies thereof were duly served on the sheriff and assessor, prior to admitting such voters, the sheriff persisted in placing them on the poll.

7th. That the sheriff placed on the poll electors who had not been registered six months prior to the teste of the writ.

8th. That the sheriff, contrary to the Statute, permitted several barristers to attend and act at the same time, such barristers being members of the general association. 1837.

9th. That the sheriff and assessor, after the final termination of the poll, struck off a good vote in favour of Mr. Bunbury.

10th. That the sheriff permitted several persons to poll who were not only not registered, but who had not taken the oaths, and whose affidavits were not lodged with the clerk of the peace.

He also referred to that part of the prayer of the petition which was applicable to the sheriff. He then contended that the high sheriff was substantially and gravely interested in the determination of the petition before the House, and entitled, within the fair construction of the Act of Parliament, to be allowed to strike the list as a party.

Mr. *Thesiger* stated, that he was taken by surprise, not having received any intimation of the course intended to be pursued. He contended that sect. 36 did not apply to the case before the House; that it was the invariable course in petitions of that nature, to insert charges against the returning officer, if the conduct of the returning officer had been improper; and that the case before the House, was not either within the letter or spirit of the Act.

Mr. *Austin* followed on the same side, and said, that if he had contemplated the course which had been taken by his learned friend, he would have been prepared at the bar with authorities against the extraordinary claim which his learned friend had been instructed to make.

Under the circumstances, he could only refer to the names of cases, observing at the same time, that the great object which was contemplated by the Acts of Parliament regulating the trial of controverted elections, was to provide a fair and impartial tribunal, which clearly could not be had on this occasion, if the sheriff of Carlow, whose politics

1837. were alleged to be the same as those of the sitting member, should be held to be entitled to a strike, which would in reality give the sitting member two strikes instead of one. That there was a recent authority on this case, which was strongly in point, and in his mind perfectly conclusive; viz. the Ipswich case, which had been discussed in the Common Pleas before Tindal, C. J., viz. Ranson and others *v.* Dundas and another. In that case (1) it was contended, that the certificate of the Speaker, touching costs, was invalid, inasmuch as the returning officer who had been complained against was entitled to notice, and to a strike, for the reasons alleged by his learned friend. After a very full hearing, it was held by the Court of Common Pleas, that a party precisely in the situation of the sheriff of Carlow was not entitled, under any of the Acts of Parliament relating to this subject, to interfere in striking the Committee.

He also further stated, that in the Colchester and other cases, examined in Mr. Serjeant Peckwell's Preface to his Reports, (2) the subject had been discussed and decided against the right to strike under similar circumstances. He then went on to state, that under the authority of the Grenville Acts, Committees of the House of Commons were empowered, not only to report on the merits of the election, but also on any other proceedings touching the conduct of the election; under which last authority it was, that they were in the habit of considering and reporting upon the conduct of returning officers, and any other persons misconducting themselves in election proceedings. He confidently relied, that the House would not come to any hasty determination, in favor of allowing the sheriff to take any part in striking the list, but, if they entertained any doubt upon the point, would order counsel to be further instructed.

(1) 3 Bing. N. C. 123.

(2) 1 Peckw. Introd. 48.

Mr. Maule shortly replied.—He stated that his learned friend had no right to complain of being taken by surprise, as he was evidently well prepared, and that the application was most reasonable and just. That it was evident, from the Act before them, which he had already quoted, that in certain cases, a returning officer was entitled to the protection given by the strike, and if ever such protection ought to be given, it was in a case where the petition contained such grave charges against the sheriff; concluding with a prayer, “that such steps may be taken, and directions given, as will effectually prevent and restrain the present high sheriff, or any future high sheriff, from permitting to vote, or place on the poll at any future election, persons who have been struck off the registry; and also that such proceedings may be taken, or orders given, as will in future prevent and restrain the sheriffs of the said county from making undue returns of members to serve in the House for the said county.”

After the counsel had closed the argument of which the above is a brief abstract, the House divided, affirming by a majority, that they had a right in certain cases to grant the privilege claimed by the sheriff of Carlow; but on further discussion, and a second division, they decided that this was not a case in which they would grant the sheriff's application.

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CASE II.

COUNTY OF THE CITY OF DUBLIN.

The Committee was appointed upon the 25th of March, 1835, and consisted of the following Members:

John Maxwell, Esq. (Chairman) <i>Lanarkshire.</i>	
John Rundle, Esq. <i>Tynistock.</i>	Hon. Thomas Vesey, <i>Queen's County.</i>
Lord James Stuart, <i>Ayr District.</i>	John Neeld, Esq. <i>Chippenharn.</i>
Sir Rufane Shaw Donkin, (1) <i>Berwick upon Tweed.</i>	Edward Holland, Esq. <i>Worcestershire (East.)</i>
George Frederick Young, Esq. <i>Tynemouth.</i>	Thomas Balfour, Esq. <i>Orkney.</i>
John Henry Vivian, Esq. <i>Swansea.</i>	Lord Albert Denison Conyngham, (2) <i>Canterbury.</i>

Petitioners—Electors.

Counsel for the Petitioners—

Mr. Harrison, K.C.; Mr. Thesiger, K.C.; Mr. Wrangham; & Sir W.B. Riddell.
Agents—Mr. Baker, London; Mr. M'Guire, Dublin.

Sitting Members—Daniel O'Connell, Esq. & Edward Southwell Ruthven, Esq.

Counsel for the Sitting Members—

Mr. Joy, K.C.; Mr. D. Pollock, K.C.; Mr. Bligh; Mr. Austin; & Mr. Hutton.
Agents—Sir R. Sidney, London; Mr. John J. Murphy, Dublin.

The House will postpone the ballot when a notice has been given by the agents of the

FOUR petitions were presented to the House of Commons against the return made for the county of the city of Dublin. They were signed by the same parties, and contained similar allegations. The first was presented upon the 25th of February, the second

(1) Vacated his seat upon the 20th of April, 1835, by the acceptance of the office of Surveyor General of the Ordnance.

(2) Excused attendance on the 30th March, 1835, upon account of illness.

upon the 4th of March, the third upon the 6th of 1835. March, and the fourth upon the 12th of March. Recognizances were not entered into on the first petition, and the order for taking it into consideration was discharged. Upon the 18th of March, Mr. O'Connell applied to the House to discharge the order for taking the other petitions into consideration; and that the ballot, which was fixed for the next day, might be postponed. The ground of the application was, that the agents for the petitioners had voluntarily informed him that they should abandon the second petition, and that he had thereupon written to his agent in Dublin, to delay the attendance of witnesses, until the recognizances upon one of the other petitions were perfected. Some dispute arose respecting the nature of the communication made to Mr. O'Connell; but there was no doubt, that an objection had been unexpectedly raised to the sufficiency of one of the sureties, upon the third petition, and that it had been specially reported upon by the examiner. The inference therefore was, that this objection had disturbed the arrangements of the petitioners; and that as the recognizances upon the second petition had not been entered into when the notice of the course proposed to be pursued was given to Mr. O'Connell, it had been intended to abandon that petition. The House acceded to the application of Mr. O'Connell, and postponed the ballot.(1)

petitioners
that may
have in-
duced the
sitting
members
to delay the
preparation
of their
defence.

The petition referred to the Committee, was the one presented upon 4th March;(2) but before Mr. *Harrison*

(1) On the expiration of time to put in an answer, the defendant lodged a petition for further time, and gave notice to the plaintiff's clerk in court. He then withdrew the petition and put in a demurrer to the whole bill. As the notice had not been withdrawn with the petition, the Court ordered the demurrer to be taken off the file, the notice tending to mislead the parties. *Murray v. Cauty*, 5 Sim. 231, and cases there cited. See *Mirror of Parliament*, March 18, 1835.

(2) *Journals*, p. 46, anno 1835.

1835. opened the case of the petitioners, some doubt being entertained if the recognizances had been entered into upon the second or the third petition, Mr. Dyson and Mr. Rose, officers of the House, and Mr. Romilly, the Speaker's secretary, were examined, and ultimately the Committee resolved, that counsel for the petitioners should proceed.

John Long, town-clerk of the city of Dublin, and clerk of the peace, produced the poll-books, together with the affidavit made by the sheriffs in pursuance of the 4 Geo. IV. c. 55, s. 76. (1) The jurat of the affidavit contained the signature of "Arthur Perrin," but it did not set forth, that the deponents were both sworn, or that the Mr. Perrin was a magistrate.

Affidavit of two deponents, omitting to state in the jurat that both were sworn, and that the magistrate who administered the oath had authority to do so, is defective.

Mr. O'Connell objected to the affidavit as defective. The poll-books cannot be received, unless the affidavit contains the particulars that would be necessary to give validity to it if it was produced in a court of law. When two persons are deponents, the jurat must set out, that they were both sworn to the truth of the facts mentioned in the affidavit, and that the person before whom it is sworn had authority to administer an oath. This affidavit does not state either of these facts.

Mr. *Thesiger* offered to give parol evidence to supply any omission in the affidavit, if the Committee should think it necessary.

Mr. *Austin*.—The affidavit is insufficient, and no evidence can be given to explain it, or to supply its defects: it is altogether bad. The 4 Geo. IV. c. 55, s. 76, requires, that within twenty-one days after the final close of the poll, the poll-books shall be delivered up by the returning officer to the clerk of the peace, verifying upon oath their being in the same state as that in which they were when the poll closed. In

(1) K. and Omb. 275, 455, 260. Perry and K. 512.

English cases, the poll-books are produced by the returning officer, who is subject to examination and cross-examination upon their custody and condition. If they appear to have been altered, they are rejected. The 4 Geo. IV. c. 55, infringes upon this right of examination, and exposes constituencies to every kind of fraud, if Committees shall neglect to construe strictly its provisions. The duty of the returning officer is clearly marked out, the form and mode in which affidavits should be made are well known, and there can be no error, without the grossest neglect. The Act substitutes the bare statement of the returning officer for the examination to which he was formerly liable, and it requires that statement to be authenticated upon oath. It takes away the protection which the public possessed under the former state of the law, and its directions ought, therefore, to be accurately followed. The correctness and the precision of the affidavit afford the only security for the proper dealing with the poll-books, which the examination of the returning officer formerly gave.

Parol evidence cannot be admitted to explain the affidavit. If it is received, the affidavit is done away with; if one omission may be explained, so may another. What security or information can the affidavit give, if one part may be altered, or statements which it ought to contain may be supplied by the parol evidence of third parties? The *vivâ voce* examination of the returning officer is superseded by the Statute, and the affidavit is substituted for it. If parol testimony is to be received in the place of that which the affidavit ought to contain, the provisions of the Statute will be set aside, together with the protection that it was intended they should secure.

The *jurat* ought to have set out, that the parties

1835. named in the affidavit were sworn. It simply states, "sworn before me;" and not that it was sworn by both the above-named deponents. The rule of the courts of law is mentioned in *Tidd's Practice*, (1) "Upon every affidavit sworn in court, or before any judge or commissioner thereof, and made by two or more deponents, the names of the several persons making such affidavit shall be written in the jurat; and no affidavit shall be read or made use of, in any matter depending in either of these courts, in the *jurat* of which there shall be any interlineation or erasure."—"In the Exchequer, it must appear by the *jurat* of every affidavit, that it has been sworn by all the deponents; but it is not necessary, as in the other courts, that they should be severally named in the *jurat* as having been sworn."—This is no capricious rule. It is necessary, to prevent collusion between parties who may be named in, but who may not be all of them sworn to the facts of the affidavit. One sheriff may have kept the books and have altered them, and the other may have sworn the affidavit, ignorant of the alterations that may have been made, or having collusively permitted them. Unless the *jurat* distinctly declares, that all the deponents were sworn, no reliance can be placed upon the affidavit. 2ndly, It does not appear that the affidavit was sworn before a proper officer. The *jurat* ought to state where, when, and before whom, the affidavit was sworn, and that the person signing it had authority to swear the deponent. *Tidd's Practice*. (2) The affidavit is so defective, that it would not be permitted to be used in a court of law, and it ought therefore to be rejected.

Mr. *Thesiger*.—The fallacy of the argument that the Committee has heard is, in assuming the affidavit to be indispensably necessary, and that the practice of the

(1) 494, 495.

(2) 493, 494.

courts of law ought to prevail here. In the *Galway* 1835. case, (1) the poll-books were received without the affidavit, upon its being proved, that the sheriff was sworn before a magistrate and verified the poll-books. Whenever a particular form of affidavit is required to be followed, a compliance with that form is requisite. The cases to which the authorities in *Tidd's Practice* relate, depended upon particular rules of courts; but no such rules have been laid down by Committees. All that is necessary is, that the affidavit shall be sufficiently distinct and precise to satisfy the Committee of the truth of its contents. If there is any doubt, parol evidence ought to be permitted to be given.

The Committee resolved to permit counsel to argue upon the admissibility of parol evidence; and the Chairman added, that it was the impression of the Committee that the affidavit was defective.

Mr. *Austin* claimed a right to commence the argu- March 31. ment upon the admissibility of parol evidence; he had taken the objection and considered himself to be entitled to the reply; but the Committee directed Mr. *Harrison* to commence.

Mr. *Harrison*.—In the ordinary courts of law, considerable strictness is observed in compelling attention to certain forms and particulars in the production of written documents, in order to prevent the necessity of constant examinations respecting them; a practice which, from the extent and pressure of the business of those courts, is necessary, to prevent the frequent occurrence of errors, the possibility of needless delay, and the detection of any frauds that may be attempted. In Committees, however, these reasons for similar strictness do not exist in the same degree, and great latitude is allowed in the correction of mistakes. The rules that

Parol evidence permitted to be given, to supply the defects of the jurat of an affidavit.

(1) P. and K. 512.

1835. courts of law have themselves framed, to regulate their own practice, are not such as a Committee of the House of Commons will, in every case, consider itself bound to follow. Upon the analogy, however, of decided cases, parol evidence may be given to supply the defects of this affidavit. *Phillips on Evidence*; (1) *Starkie on Evidence*. (2) In an action for bribery, parol evidence of the time when a precept was delivered to the returning officer was permitted, notwithstanding an attested indorsement of the fact upon it. But cases of affidavits are numerous, to show that the very facts, the statement of which, in the jurat, is represented to be essential to the validity of this affidavit, may, whenever an affidavit is sworn out of England, be proved, in this country, by the testimony of third parties. *Omealy v. Newell*. (3) An affidavit of debt made in Paris, before a magistrate, whose signature to the jurat and his authority in that country to administer oaths were verified by an affidavit made here, was received. *Voght v. Elgin*; (4) an affidavit made before the Prætor of Hamburgh, verified here, was admitted. *French v. Bellew*; (5) the signature of the Chief Justice of Ireland was written in the jurat, but no place was mentioned, and the affidavit was received upon his signature being verified in this country. *Dalmer v. Bernard*; (6) an affidavit sworn before John Cosnahan, who styled himself "High Bailiff and Chief Magistrate of the district of Douglas in the Isle of Man," was permitted to be used, upon an affidavit being sworn by one Joseph Christian, who deposed, that he had seen John Cosnahan, High Bailiff, &c. write, and that he verily believed that his

(1) 1 Phill. on Ev. 540, 7th edition. *Bishop of Meath v. Lord Belfast*, 1 Wils. 215. (2) 2 Starkie, 576. *Grey v. Smithers*, Burr. 2273.

(3) 8 East, 364.

(4) 8 East, 372.

(5) 1 M. and S. 303. *Sharp v. Johnston*, 1 Hodges, C. P. 298.

(6) 7 D. and E. 251.

name at the foot of the paper produced was in his handwriting. In these cases, the description given by the magistrates who signed the affidavit, of their office and authority, was of no avail without the testimony of some person in this country to prove its truth. It was not upon the statements of the jurat, but upon affidavits received, to prove that the persons named in the jurats were magistrates, that the courts relied. The fact of the party representing himself to be a magistrate, was in itself no proof of his holding such an office, or of his being competent to administer an oath. The evidence contained in the affidavit, made by third parties in this country, which is precisely similar evidence to that tendered in this case, was that relied upon to prove the authority of the magistrate who signed the jurat. In the case of *Kennet and Avon Canal Company v. Jones*,⁽¹⁾ the affidavit was not entitled "in the King's Bench," and the jurat stated it to be taken before "A. B., a commissioner, &c." without adding "of the Court of King's Bench;" but it was received upon the production of an affidavit verifying the fact, that A. B. was a commissioner to take affidavits. The jurat was not conclusive; its defects were not fatal to the affidavit; and evidence was received to supply its omissions.

The principle of permitting amendments to written documents has even been extended to supply omissions in the caption of an indictment. *Faulkner's case*; ⁽²⁾ *Rex v. Atkinson*. ⁽³⁾

The cases determined in Parliament have established, that any departure from his duty, or any neglect of a public officer, that has not affected the taking of the poll, will not avoid an election, or prevent a scrutiny. In the *Colchester case*,⁽⁴⁾ the Committee did not

(1) 7 Durn. and E. 451.

(2) 1 Saund. 249.

(3) 1 Saund. 249 n.

(4) 1 Peckw. 507.

1835. consider the omission of any form prescribed by a directory Act of the 25th Geo. III. sufficient to make the election void, or to affect the votes of freemen admitted at courts held the third day of the election. In the *Gahway case*,⁽¹⁾ the sheriff absconded without making the affidavit required by the 1 Geo. IV. c. 11, but the sittings of the Committee were continued. *Clonmel case*; ⁽²⁾ *Coleraine case*; ⁽³⁾ *Gahway case*. ⁽⁴⁾

The inferences, therefore, of these cases are, that the statements in the jurat of an affidavit may be confirmed, and that any omission, whether it relates to the fact of both the deponents being sworn, or to the authority of the magistrate, may be supplied by the evidence of third parties; and, secondly, that any error in the form of the affidavit will not prevent the Committee from receiving the poll-books. It ought not to be permitted, that an irregularity, of which the returning officer may be guilty, should injure parties who have no control over his acts; or that it should be in the power of any justice of the peace, by a negligent or wilful irregularity in an affidavit, to defeat the right of electors of any county or borough, to prove that a legal majority of votes was not in favour of the persons petitioned against.

Mr. Austin.—The affidavits made in foreign countries, and referred to in the cases cited, set forth in the jurat the authority of the magistrate before whom they were made. The affidavit here, does not state Perrin, who signed it, to be a magistrate; and it is otherwise defective in not stating that both the deponents were sworn. The 4 Geo. IV. c. 55, s. 76, requires that the returning officer—shall, within twenty-one days of the

(1) P. and K. 240. (2) P. and K. 426. (3) P. and K. 507.

(4) P. and K. 512. See *Ennis case*, K. and O. 432; *Carlow County case*, K. and O. 455; *Cork City case*, K. and O. 275.

final close of the poll, deliver up all the poll-books of 1835.
 an election to the clerk of the peace for the county of
 a city, or the county of a town, verifying upon oath
 the poll-books that he delivers. He is to make an
 affidavit, that no erasure, alteration, or addition, has
 been made in them. (1) Now an affidavit is an oath
 in writing, signed by the party deposing, and sworn
 before and attested by him who has authority to
 administer the same. *Bacon's Abridgment*. (2) It is a
 deposition written out, and the person administering the
 oath is ignorant of what it contains. It is made to
 supersede the necessity of parol evidence, and parol
 evidence and an affidavit cannot co-exist together. The
 signature, therefore, of the person administering the
 oath, ought to appear, with every circumstance that is
 required to give validity to an affidavit produced in a
 court of law.

What are the cases in which it is said that an affidavit
 may be explained? In *French v. Bellew*, (3) no place
 was mentioned in the jurat, but the signature of the
 Chief Justice of Ireland was verified by an affidavit
 sworn before a judge at Serjeant's Inn. Lord *Ellen-*
borough in this case said, that the affidavit was in the
 nature of a solemn certificate of the existence and re-
 ality of a debt; but that it might appear by any such
 evidence as the court should think reasonable. The
 other cases cited of foreign affidavits were similar to
 this, and related to the proof of debts. The courts were
 guided by their estimation of the value of the evidence

(1) It is always customary to make an affidavit in order to facilitate the
 proof of the verification of the poll-books by the returning officer, as required
 by the statute; but the direction of the statute is simply that the poll-books are
 to be verified "upon oath;" and it adds, that "the production of such poll-
 books, by such clerk of the peace, or officer, or his deputy, shall be deemed
 sufficient evidence of the authenticity thereof, unless the same shall be dis-
 proved." 4 Geo. IV. c. 55, s. 76.

(2) Title, *Affidavit*.

(3) 1 M. & S. 303.

1835. offered, and were not bound to require any affidavit; but the Committee can exercise no such discretion. Their power to receive the poll-books is given by the Statute; and where an Act of Parliament has directed a thing to be done in a particular way, it cannot be done otherwise. (1) Parol evidence cannot be given, or be required in substitution of the evidence that the Legislature has rendered necessary. But even the practice of the Courts is not without limit. *Armstrong v. Stratton*. (2) The Court stated, that when an affidavit is found to be defective, it may permit a supplemental affidavit to be filed, but that it was a power it would very sparingly use. *Osborn v. Tatum*. (3) A rule to set aside execution on a judgment, on a warrant of attorney, had been obtained; and it appeared from the jurat, that the affidavit had been sworn before one of the judges of the court, but it was set aside because it was entitled "in the," without adding "Common Pleas."

The omission in the jurat of any statement that both the deponents were sworn, prevents the affidavit being used. Alterations in the poll-books may have been made by one of the sheriffs; and, in its present shape, the affidavit affords no evidence of the truth of any of the facts that it recites. No perjury could be assigned upon it; and the evidence tendered ought not to be permitted to be given, unless the affidavit is sufficient to sustain an indictment in the event of its being shown that its contents are false. (4)

(1) Execution of Wills under the Statute.

(2) 7 Taunt. 430.

(3) 1 Bos. and P. 271.

(4) "It does not appear that any difference, in point of reason or law, exists between holding to bail, as it is practised in the more frequent instances of affidavits made in Ireland and Scotland, and of affidavits made in places abroad out of his Majesty's dominions. The practice in both cases must be equally warranted or unwarranted. In none of these cases can the party making a false affidavit be indicted specifically for the crime of perjury in the Courts of this country; but in all of them, as far as the party is pu-

In the Court of Chancery, a joint and several answer of two defendants, who are sworn to the truth of their statement, will be suppressed, if it does not appear that they were both sworn. (1) 1835.

The cases that have been relied on, and are mentioned in *Starkie on Evidence*, and *Phillips on Evidence*, respecting latent ambiguities, have no application. In the *Clonmel case* no affidavit was produced; the form and contents of the affidavits in the *Coleraine case* were not disputed; and in the *Galway case* there was no discussion.

The Committee has determined the affidavit to be defective; its production is made necessary by the Statute, and parol evidence cannot be given to supply any statements that are omitted in it. The mode in which the duty of the returning officer is to be performed has been regulated by the Legislature, and the Committee cannot depart from it.

Mr. *Harrison* replied; and the Committee resolved:—

“That the petitioners be permitted to adduce evidence, for the purpose of supplying defects or omissions in the document which has been tendered to the Committee, in proof that the poll-books have been verified upon oath, as required by the Act of the 1 Geo. IV. c. 11, s. 3.” (2)

John Long was then called. He was in the office attached to the Court of the High Sheriff, upon the 7th of February, and was sent for to be present in the

punishable at all, he is punishable for a misdemeanour, in procuring the Court to make an order to hold to bail, by means and upon the credit of a false and fraudulent voucher of a fact produced and published by him for that purpose. The party injured thereby is not without his remedy, nor the Court without its due means of punishment, in respect of the abuse and contempt committed against its authority.” 8 East, 372.

(1) Newland's Chan. Prac. 126.

(2) This Section of the statute cited is repealed, but a similar section is contained in the 4 Geo. IV. c. 55, s. 76.

1885. chamber where the Lord Mayor of Dublin was sitting, for the purpose of receiving the poll-books from the sheriffs. He saw the sheriffs go up two or three steps to the bench, and was near enough to see them sworn by the Lord Mayor. He did not hear the oath, nor see either the sheriffs or the Lord Mayor sign the affidavit, but knew the signatures to it to be in their hand-writing. The sheriffs kissed the book, and immediately afterwards handed to him the affidavit. It did not occur to him to remark, if the ink of the signatures was fresh or dry. He was cousin of one of the petitioners, and brother of one of the sureties in the petition; and the Lord Mayor was another of the sureties.

Mr. Pollock.—The testimony of the witness has not supplied the defects of the affidavit. In the absence of any attestation, to show that the parties were sworn to its contents, the fact ought to be distinctly proved. The affidavit may have been made out of court, and have been signed without any oath being administered; it may have been a transaction *coram non judice*. The oral evidence does not prove that the Lord Mayor signed the affidavit, or that what the witness saw related to it. It is essential that this should be distinctly proved before the Committee proceeds. Why has the Legislature fenced the seat with certain securities, if the slight circumstances that have been given in evidence are to be considered sufficient to establish the proof of the poll? Are the defences which the law has granted, to be set aside upon the occurrence of any act of negligence or omission? The Act rendering this affidavit necessary, was passed to save the expense of producing the returning officers to prove the poll; but, at the same time, it gave certain directions which, in the absence of the return-

ing officers, must be followed. When the petitioners found that the affidavit was imperfect, that it omitted a statement essential to its validity, it was their duty to have procured the attendance of one of the sheriffs.

Mr. *Wrangham* replied; and the Committee determined, that the poll-books had been sufficiently proved. (1)

In the course of the examination of Long, Mr. O'Connell addressed the Committee; and upon Mr. Austin being about to follow him, an objection was taken, that two counsel ought not to be heard; *Carmelford case*. (2) Mr. Austin cited the *Great Grimsby case*. (3)

The Committee resolved, "That each sitting member may appear, either by himself or one counsel." (4)

Mr. *Wrangham* applied for permission that the petitioners might be heard by two counsel.

The Committee resolved, "That additional counsel be heard for the petitioners;" and it was agreed between the parties, that there should be but one cross-examination, and one general reply.

APPLICATION FOR A COMMISSION.

The notice for a Commission to examine witnesses in Ireland, stated, "That as, from the number of witnesses, the petition of, &c. against the return of Daniel

April 2.
Commission to examine witnesses in Ireland granted.

(1) See *Drogheda case*, Cor. and D. 97 n.

(2) Cor. and D. 253.

(3) 1 Peckw. 60.

(4) 1 Fraser. 27; 1 Doug. 56; 3 Doug. 277. Where there is a real separation of interest, two counsel are allowed to each of the sitting members. 1 Lu. 469; 1 Peckw. 184; and see title *Counsel*, in Chambers's Dictionary of the Law of Election. After the return of the Commission, Mr. *Austin* appeared for both the sitting members, and not for Mr. Ruthven alone.

1835. O'Connell, Esq. and Edward Southwell Ruthven, Esq. as members for the city and county of Dublin, could not be inquired into without great expense and inconvenience; an application would be made for a Commission under the 42 Geo. III. c. 116." Separate notices on the part of both the sitting members were served in Dublin, upon each of the petitioners, upon the 7th of March; and also upon the agent of the unsuccessful candidates. (1)

Mr. O'Connell addressed the Committee upon the general character of the various allegations contained in the petition against his return;—of their difficulty—their complexity—the various inquiries they rendered necessary—the many witnesses whose presence would be needed, if the evidence was not taken in Dublin—the enormous expense that would be incurred, and the hardship of bringing witnesses from a remote distance, both to themselves and to those at whose expense they should be brought. The scrutiny that was to be commenced, could only be exhausted in England, by the exhaustion of the means of one of the parties to continue it. A Commission would give to him no undue advantage; it would be equally convenient, equally cheap, and, to all parties, equally just.

When evidence was about to be heard in support of the application for a Commission, some doubt arose, if, in the *Drogheda case*, (2) the witnesses were examined by the Chairman, without the intervention of counsel; and if, in the event of the counsel for the petitioners addressing the Committee, the counsel for the sitting members would be entitled to reply.

(1) The Statute requires (sect. 5), that the notice shall be given "as soon as the petition is presented to the House of Commons;" and notice was in this case given in London, to the agent of the petitioners, the same night on which the petition was presented. See K. and O. 293; and *Drogheda case*, Cor. and D. 112.

(2) Cor. and D. 113.

The Committee resolved, "That the counsel for the sitting members should proceed with the evidence to prove the necessity of a Commission; but the Committee could not give the counsel for the sitting members the reply, unless evidence was called by the petitioners."

Mr. J. J. Murphy, the agent for the sitting members, was then examined by Mr. *Austin*. He had got up the case of the sitting members, and had minutely and accurately gone through the statement of the petitioners. The objections made, on the part of the sitting members, amounted to 1110, about 100 of which were entered twice. The petitioners had made about 2000 objections, under 17 different classes. The first nine classes contained about 568 names of persons objected to, for the non-payment of taxes; class 10, objections on account of voters ceasing to occupy the premises, in respect of which they registered upon the time of polling, 120; class 11, non-occupancy, 47; class 12, insufficiency of the value of the qualification of the voter, 170; class 13, employed in the royal canal, 13; class 14, insolvents, 21; class 15, non-registered, 3; class 16, upon account of bribery, 17; class 17, employed in the post office, 11; which amounted in the whole, by consolidating the first nine classes as containing a repetition of names, to 970 electors objected to. The average expense of bringing witnesses over as cabin passengers, from Dublin to Liverpool, would be about 1*l.* 2*s.* independent of any expense for loss of time, and for their maintenance; and 425 witnesses might be necessary, if the case should be completely investigated.

Mr. Rose, of the House of Commons, was then called to inform the Committee of the allowances made to witnesses, in various classes of life, for loss of time and personal expenses, upon the taxation of costs.

1835. Mr. *Austin*.—The 4th section of the 42 Geo. III. c. 116, provides, that upon its appearing to a Committee “from the nature of the case, and the number of witnesses to be examined relative to any particular allegation or allegations in the said petition, that the same cannot be effectually inquired into before such Committee, without great expense and inconvenience to the parties, or either of them; it shall and may be lawful to and for the said Select Committee, upon application of any the parties before the said Select Committee, at any period during the course of their proceedings upon such petition, to make an order for the nomination and appointment of Commissioners.” The power thus conferred upon the Committee, has been considered to be discretionary; but there is in fact no discretion given. If the circumstances of the case are sufficient to establish, that the investigation cannot proceed here without great expense and inconvenience, the Commission must issue. The words, “shall and may,” mean “must.” No Statute invests a judicial body with the power of caprice. As soon as the facts are sufficient to call for the application of the law, the Commission must issue. In various Statutes, the words “shall and may,” are introduced, because the powers conferred may sometimes be exercised one way, and sometimes another: but, whenever words of permission confer a benefit upon the public, and the facts proved bring the case within the application of the law, they are to be construed imperatively; *Dwarries on Statutes*. (1) “Words of permission are sometimes obligatory: where a Statute directs the doing of a thing for the sake of justice, the word *may*, means the same as *shall*. The Statute 23 Hen. VI. c. 10, says, the sheriff, &c. ‘may’ take bail; but, the construction

(1) Vol. ii. 712.

1835.

has been, that he is bound to take bail. So, if the Statute says, that a thing may be done which is for the public benefit, it shall be construed that it *must* be done.”(1) A churchwarden was indicted for not making a rate, and an exception was taken, that the Statute 14 Char. II. c. 12, only put it in their power to do so by the word *may*. But it was determined that, where a statute directs the doing of a thing, for the sake of justice or the public good, the word *may* is the same as the word *shall*. *Rex v. Barlow*.(2) When also the establishment of a court is authorized by a charter, words of permission are construed to be obligatory, the court being for the public benefit; *Rex v. The Steward, &c. of Havering-atte-Bower*; (3) and in *Rex v. Mayor and Jurats of Hastings*,(4) the Court stated, that “ words of permission in an Act of Parliament, if tending to promote the public benefit, are always held to be compulsory;” and that therefore words of permission in a charter to hold a court of record, were imperative. The intention of the Act in this case is to spare expense, and to avoid the inconvenience of drawing witnesses from a distance. These are objects of great public importance. The Act which enables a Commission to be issued recites, that it is expedient to regulate the expenses of members to serve in Parliament for Ireland; and the preamble of the Reform Act

(1) In deciding upon the Statutes of Magdalene College, Blackheath (Morden's Charity), Lord *Hardwick* held, (3 Atkins, 166,) that the words “shall and may,” in general Acts of Parliament, or in private constitutions, were to be construed imperatively; and that the trustees who, in cases of drunkenness, “shall and may by writing under hand and seal,” turn out certain of the merchants, beneficiaries of the charity, “must” remove them. See also *Rex v. Urkwold Inclosure*, 2 Chit. 251. In the case of a private deed relating to the investment of money, “shall and may” are not construed to be imperative words. *Stamper v. Miller*, 3 Atk. 212.

(2) 2 Salk. 608.

(3) 5 Barn. and Al. 692.

(4) 1 Dow. and R. 149.

1835. also recites, that it is expedient to extend the elective franchise in Ireland; to extend the number of representatives; and "to diminish the expense of elections therein." Both Acts are *in pari materia*, and are for the purpose of diminishing expense. This is a great public object, as it favours the freedom of election, is in favour of, and for the benefit of the public. If it is proved, that great inconvenience and expense will result from pursuing the inquiry here, this application must be complied with. Does it then, or does it not, appear by the evidence, that much inconvenience and expense will be incurred, by pursuing the inquiry here; and that both may, to a very great extent, be prevented, by referring the collection of the evidence to Dublin? What in former cases has been considered to authorize the issuing of a Commission? In the *Dublin University case*, (1) only 39 persons voted for the sitting members and 29 for the petitioner, yet the commission was granted, though the sole question related to the eligibility of the sitting member upon account of his not being a member of the University. In the *Waterford case*, (2) the number of objections was under 400, yet the Commission was ordered to be issued. In the *Drogheda case*, (3) 40 freemen were objected to, as having been bribed, to prove which fact 20 witnesses were necessary; 21 freeholders were objected to as improperly registered, or as having been bribed, to prove which would require ten or twelve witnesses; and a claim was made to add eleven votes to the poll, in support of which eight or ten witnesses were necessary; and the Commission was ordered to issue. It does not appear in the *Waterford case* how many witnesses were supposed to be necessary; but the sitting

(1) 1 Peckw. 21.

(2) 1 Peckw. 228.

(3) Cor. and D. 113.

member polled 471 votes, and his majority was only 31. Here the majority amounts to 223 for Mr. O'Connell, and 217 for Mr. Ruthven. 1835.

Mr. Austin then proceeded to point out the nature of the evidence, and the number of witnesses that would be required to prove each of the allegations in the statements of the petitioners, and of the sitting members, and then argued that the words of the Act applied in a remarkable manner to the present case. In Dublin, the witnesses would be upon the spot, always ready to be examined; they would know the precise moment when their attendance would be necessary, and might continue their ordinary business without that long interruption which their attendance in England would occasion. It had been unfairly asked, if the inquiry might not last nine months. It was a question that ought not to be regarded. If the inquiry lasted nine months, or nine years, it was not for the Committee to be influenced by the possible length of time that it might occupy; they had only to decide upon the terms of the Act of Parliament, and to say, if the expense and the inconvenience which it contemplated had been proved. Whatever would occupy time in the investigation in Dublin, would occupy time here. The same witnesses and the same documents would be necessary in both places. The duration of the inquiry can only be shorter in England than in Dublin by the exclusion of testimony that ought to be heard. It may be argued, that the petitioners have already brought over some of their witnesses, and ought therefore to be permitted to proceed. For what purpose is the notice in the 5th section intended, if such an argument can be of any force? Is it not to prevent this expense? If they have brought over their witnesses to England, have they not done so at their own own peril; and shall

1835. the sitting members be affected by reason of an expense which has been needlessly incurred ?

Any possible interruption, or disturbance in the collection of evidence in Dublin, can no longer be urged. The charges of intimidation contained in the petition have been abandoned. With all the temptations to practice intimidation in order to influence this return, it is admitted that the allegations charging it, contained in the petition, were mere pretences, and that there is no evidence to sustain them. There is then no reason to suppose that the judicial inquiries that this Committee may sanction will be disturbed ; or that any improper influence will be exercised over the witnesses who may be examined, or over the proceedings of the Commissioners.

Suppose that the Commission is granted, what will be the course of the investigation that will take place ? Three barristers will collect the information necessary for the determination of every case, and, when their sittings are at an end, will send the evidence that they have received here. They will find the facts, and the Committee will apply the law. The scrutiny will then proceed without interruption, and with the greatest possible dispatch and rapidity. Vexatious proceedings will be checked by the same fear of the infliction of costs upon the parties guilty of them, that would prevent their occurrence before this Committee.

Having made out a case of great and real expense, in undertaking the scrutiny, without the assistance of a Commission, it is imperative upon the Committee to grant this application. No witnesses are to be produced to contradict the evidence of its necessity, and it must therefore be considered to be admitted.

Mr. Harrison.—The Committee is bound to look at the interests of the petitioners, and not to regard the

mere question of expense and inconvenience. It cannot be without great expense or inconvenience, that any petition can be supported; and the greatest injustice will be done, if the inquiry is, upon these grounds alone, to be referred to Ireland. Let a Commission be granted, and in most cases the seat of the sitting member may be ensured to him as long as the Parliament continues. If the investigation is proceeded with by the Committee, they will act as judge and jury, and there will be no delay. No other evidence will be tendered to them but that which is legal and legitimate. But no Court of more defective powers was ever constituted than that which Commissioners may hold. They are not competent to reject any evidence: every statement that is made must be written down. They make out what is called admitted and rejected evidence: but the rejected evidence must be reduced into writing; and upon two occasions the rejected evidence was twice the length of the evidence admitted. It is true, that if the Committee shall be of opinion, that any of the evidence given shall be impertinent or irrelevant, they will be able to charge the party producing it with costs: but, how inefficient is this remedy in cases of needless delay. The seat is maintained during the whole period of a long and protracted inquiry; the parties not entitled to be returned continue to be members of the House. The exclusion from the seats is complained of. It is not the mere expense that is to be considered, but the time that may elapse during which the seats may be wrongfully occupied. If the Committee continue the inquiry, it will be closed within a short time; but if they issue a Commission, it will be impossible to say when it will end. [Sir R. Donkin.—You merely show that there are provisions in the Act that may produce dilatory proceedings; not that we

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1835. should not issue the Commission.] The Act is an instrument to defeat the justice of this case, which the sitting member claims to have put into his hands. It is mischievous instead of being beneficial, and will avoid neither expense nor inconvenience. It was passed immediately after the Union; and from that time to the present, an interval of thirty-two years, there have been only four Commissions. In 1833, there were fourteen Irish petitions, and in 1831, eleven; but in neither of these years was a Commission issued. In the *Dublin case*, and in the *Waterford case*, the Commissions were issued by consent. In the *Drogheda case*, the Commission was issued in May 1819, and its proceedings were put an end to by the demise of the Crown in the January following.

What reasons are offered to induce the Committee to accede to this request? The notice that has been given will enable the application to be made at a subsequent stage of the proceedings, but it is not sufficient to justify the suspension of any evidence that the petitioners now choose to offer (1). The hearing may be proceeded with, without any injustice to the sitting members. Before the Commission can be issued, the Committee must specially assign the facts and allegations that the Commissioners are to inquire into; and all that is asked, is to enable them to cull out and select those parts of the case that they may be unable to deal with; and that those parts of it, upon which, it is conceived, no difficulty will occur, may be submitted to them. Mr. Harrison, then stated, the facility with which the case of the petitioners would be proved, and went through the various allegations of the petition, pointing out the limited extent of the evidence he should have to offer; and contended, that the words of the Act had never been construed to make it im-

(1) See K. & O. 459.

perative upon a Committee, in any case, to issue a Commission. 1835.

Mr. *Wrangham* was heard upon the same side ; and Mr. *Austin*, after some opposition, was heard in reply.

The Committee resolved :—

“That, as it appears to this Committee, from the April 4. nature of the case, and the number of witnesses to be examined, relative to the allegations in the petition, the same cannot be effectually inquired into before the Committee, without great expense and inconvenience to the parties, a Commission do issue as prayed for.”

Mr. *Harrison* applied for permission to be re-heard April 6. against the issuing of a Commission. In cases of single A re-hearing against votes, such an application is frequently granted, and an application for a Commission to examine witnesses in Ireland, after the issue of a Commission had been resolved upon, refused. he believed that he could fully justify it in this case, if he was allowed to offer evidence.

Mr. *Young* retired to consider the application under protest. He thought it improper that the question should be re-considered.

The Committee resolved, “to proceed to give effect to their resolution for issuing a Commission.”

The list of the names of barristers who had consented to become Commissioners was procured from the secretary of the Speaker, and each party handed to the Chairman three names of such barristers, according to the 42 Geo. IV. c. 116, s. 7. The names were then put together, and each party alternately struck off a name, until the list was reduced to two. The Chairman was named by the Committee.

Mr. *Wrangham* applied to the Committee to assign The inquiries of the and limit the inquiries of the Commissioners. There Commissioners limited, were several questions of law that they might hear and determine before the Commission issued, which, if referred as open questions, upon which evidence might evidence upon the

1835. be given, would protract the inquiry, and greatly increase its expense.

case heard
by the Com-
mittee.

Mr. O'Connell.—The Commission has been ordered upon the entire case. It may be limited to particular allegations of the petition. In this case it has been granted generally. It would be monstrous now to hear parts of the case, or to have it argued by instalments. Both sides will go before the Commissioners, at the peril of costs, if they create any unnecessary expense, or improperly delay the proceedings. It has been determined, that the Commission shall issue as prayed, and it only remains to consider the form in which the order must be drawn up.

The Committee resolved, "That the petitioners deliver in writing, a list of such allegations, matters, and things, contained in the petition, as they consider ought to be determined by the Committee, and excluded from reference to the Commissioners this day appointed.

It was directed that no witness should be examined, and that the counsel for the petitioners were limited to mere questions of law.

The petitioners delivered in the following list :—

" Allegations, matters, and things which the petitioners contend ought to be determined by the Committee, and excluded from reference to the Commissioners.

" 1. Whether a voter must be in arrear more than the one half-year's amount of more than one municipal cess-rate, or tax, before he can be disqualified from voting ?

" 2. Whether the paving, cleansing, and lighting tax, due and payable on the 5th of January, 1834, be a municipal cess-rate, or tax, the non-payment of which, over and above one half year's amount of the same, disqualifies from voting ?

" 3. Whether the same tax is due and payable on the 5th of January, 1835, being a municipal cess-rate, or tax, the non-payment of which, over and above one half year's amount of the same, disqualifies from voting ?

" 4, 5, 6, 7, Repeated the question with respect to the pipe water, watch tax, wide-street cess, and watering rate being municipal rates? 1835. —

" 8. Whether any person claiming to vote as a householder can be permitted to vote without being assessed to the Grand Jury, or municipal cesses, rates, or taxes above-mentioned, or some of them, or without having paid the whole of them over and above one half year's amount of the same?

" 9. Whether the occupier of only part of a house can vote?

" 10. Whether the occupier of only a part of a house can vote, if more than one half year's Grand Jury, or municipal cesses, or taxes, remain due or payable, in respect of the premises out of which such occupier claims to vote?

" 11. Whether any agreement between a landlord and tenant, that the former shall pay the Grand Jury, or municipal cesses, rates, or taxes, to the payment of which the latter is by law liable, can absolve the said tenant from such legal liability while such cesses remain due and payable, over and above one half year's amount of the same?

" 12. Whether the register is, or is not, to be considered conclusive as to the right to be registered of all those whose names appear upon it, whose admission upon the register was not objected to at the time of their registry?

" 13. Whether the register is, or is not, to be considered conclusive as to the right to be registered of all those whose names appear upon it, whose admission upon the register was objected to at the time of their registry, and adjudicated upon by the registering barrister?

" 14. Whether the fact of the payment of the Grand Jury, or municipal cesses, rates, or taxes, by any voter, can be proved by the evidence of such voter himself?

" 15. Whether persons voting in right of their tenure of lands, houses, and premises, under the Royal Canal Company of Ireland, are not disqualified from so voting?

" 16. Whether any recriminatory evidence can be admitted under this petition against the unsuccessful candidates (except so far as regards the disqualification of voters), they not being petitioners or any party before the Committee?

" 17. Whether the Commissioners of the Paving Board are disqualified from voting?

" 18. Whether the heads of objections stated against the

1835. names of objected voters, in the list of such voters delivered in and interchanged by and on behalf of the sitting members, be good and sufficient ; or whether they be not so vague, complicated, confused, and erroneous, as to be altogether inadmissible and contrary to the Statute ?

“ 19. Whether any evidence can be received by the Commissioners, for the purpose of placing upon the poll, in favour of the candidates at the late election, the name of any voter who had not actually tendered his vote for one or more of the said candidates ?

“ 20. Whether any evidence can be received by the Commissioners, under this petition, tending to support a charge against the agents, poll-clerks, sheriffs, or other officers employed in the election, of rejecting, delaying, or impeding from voting, electors alleged to be in the interest of the sitting members, unless a list of the voters and the names of such voters, so obstructed, delayed, or impeded, be in the first instance furnished by the sitting members to the petitioners ?

“ 21. Whether, in the case of a voter tendering his vote, and being rejected in consequence of declining to take the oath prescribed in Schedule B of the Reform Act, and subsequently returning and repeating the tender of his vote, and offering to take the said oath, ought to have been received and admitted to poll on such occasion ?

“ 22. Whether the production of his admission upon a stamp be necessary to substantiate the right to vote of an elector claiming to be a freeman ?

“ 23. Whether the production of such stamped admission be necessary, for the same purpose, in case the voter has acted and voted as a freeman for six years, or upwards, previous to the election ?

“ 24. Whether persons appointed under the 48th Geo. III. c. 140., were incapacitated from voting at the election ?”

The Committee, upon the above list being delivered, resolved :—That they were ready to hear arguments as to the legal competence of the Commissioners to decide the questions which the petitioners contend ought to be excluded from reference to the Commissioners.

Considerable discussion then occurred upon the course that ought to be pursued. On one side it was

contended, they had to draw up a statement in the nature of an issue directed by a court of equity to be tried, and that it was necessary each of the questions submitted to the Committee should be argued. On the other side it was said, that all the allegations depended upon matters of fact, which ought to be ascertained before any legal arguments were heard; that if there was to be a discussion upon the twenty-four questions that had been propounded, time and deliberation would be necessary to prepare for it; that each question would at least occupy a day; and that, finally, no facts might be proved calling for the application of the decisions that might be made.

The Committee resolved, That the parties be heard upon one general pleading upon the allegations, matters, and things, contained in the statement put in.

All parties concurred that it was impracticable for them to include, in one argument, the twenty-four points of law contained in the statement.

It was then agreed, that the 18th question, relating to the form of the statement of the sitting members, should be argued.

Mr. *Thesiger*. — The objection to the statement of the sitting member is, that each distinct class of voters objected to concludes with general and vague allegations, which invalidate the more specific ones that are conjoined with them. By the 42 Geo. III. c. 106, s. 3, parties upon Committees are to interchange “statements in writing of all particulars respecting any right of voting, or of choosing and nominating a returning officer; and respecting all such matters and things whatever, as either of the said parties mean to insist on, or to contend for, or to object to.” Under this Act it was permitted in the *Waterford case* (1) to amend

Lists and statements of the sitting members permitted to be amended.

(1) 1 Peckw. 228, anno 1803.

1835. the statement given in on the part of the sitting member. The power thus exercised was considered to be so objectionable, that the 47 Geo. III. sess. 1, c. 14, was passed, which requires that the lists "shall specify and particularize against every vote, and against the name of every voter, contained in such list, the specific and particular ground or grounds of objection." There is a studious minuteness and particularity in these expressions, evidently intended to prevent loose and uncertain generalities. But in the statement before the Committee, not merely are the heads of objection so arranged, that it is difficult to discover to what persons they relate, but in every case the specific objections are followed with general charges, which may admit of evidence being given upon nearly every cause of disqualification that can be suggested. *King v. Sheard*, (1) an appeal was entered into against certain accounts, the hearing of which was objected to, as the particular grounds of appeal against the items contained in the notice were not specified and stated in the notice, as directed by the 41 Geo. III. c. 23, s. 4. Justice Bayley, in delivering the judgment of the Court, said, "Where a notice is general, and leaves it uncertain upon which of several possible grounds of objection an item is questioned, can we say that it states and specifies a particular ground of objection? We think not." These words apply closely and precisely to this case. Can it be said, that under the 47 Geo. III. a proper specification of the objections intended to be insisted upon by the sitting members, has been made? The statement is invalid, and the Committee cannot receive it.

Mr. *Austin* contended, that if there was one specific objection, any general allegations were mere surplusage.

(1) Barn. & C. 857.

1835.

In an appeal under the Poor-Law Act, there may be twenty grounds of objection, but it is sufficient if there is only one that can be proceeded upon. So if there are many absurd or improper objections made in a statement of objections to voters, but one good one, that one may be dealt with, and the rest may be rejected. Multifariousness in pleading does not terminate a cause; it is committed at the peril of costs. In the case of the *King v. Sheard*, there were no particular objections set forth in the notice. It was generally objected, that thirty-five items in an account ought to be struck out, without stating specifically any ground for their rejection. If there had been one specific ground mentioned, it would have been sufficient. The *Waterford case* is, however, decisive, that the statement may be amended, if the Committee is of opinion that the general expressions in each class of objections are redundant, and ought not to have been inserted. The Statute has provided no particular form in which it ought to be drawn up. (1)

There were several names, including some of the Judges of the Supreme Courts, in the list of objections made by the sitting members, which it was admitted ought not to have been inserted in it.

The Committee resolved :—That in order to enable the Committee specially to assign and limit the facts, allegations, matters, and things respecting which the Commissioners may be required and directed to examine evidence, the sitting members do amend the lists and statements handed in on their behalf, by specifically stating, against the name or names of every voter, or class of voters objected to, the particular objections

(1) In *King v. Sheard*, Mr. Justice Bayley remarked, that the 41 Geo. III. c. 23, requiring the grounds of an appeal to be stated, prescribed no particular form in which they were to be set forth.

1895. on which the parties intend to rely, and that all names inserted in error be expunged from the said lists.

April 10. Upon the amended lists being put in by the counsel for the sitting members, it was complained that the change made in them was so extensive as to make them new lists.

The Committee, without hearing any argument, retired, and upon their return stated, that in pursuance of their resolution to grant a Commission, they had proceeded to limit, as far as appeared practicable, the matters to be referred, and upon the questions delivered in by the petitioners, had resolved :

1. That any voter being in arrear for more than one half-year's amount of the Grand Jury, or any municipal cess-rate or tax, due or payable by him at the time of voting, is thereby disqualified.

With respect to the questions numbered 2, 3, 4, 5, 6, 7, 9, 10, 13, 15, 17, 21, 24, they would not now decide upon them.

8. That any person claiming to vote, or registered as a householder, and otherwise qualified, can be permitted to vote without being assessed to the Grand Jury, or municipal cesses, rates, or taxes.

11. That counsel be heard upon this question.

12. That the register is to be considered conclusive as to the right to be registered, of all those whose names appear on it, and whose admission thereon was not objected to at the time of registry.

14. That the fact of payment of the Grand Jury cesses, rates, or taxes, by any voter, cannot be proved by the evidence of such voter himself.

16. That recriminatory evidence cannot be admitted.

18. That the lists as amended by the sitting members, subject to the qualifications rendered necessary

by the resolutions of the Committee, be referred to the Commissioners. 1835.

19. That no vote, not absolutely polled or tendered, can be the subject of evidence before the Commissioners.

20. No such evidence as that mentioned in the 20th question can be received.

22 and 23. That counsel be heard upon the 22nd and 23rd questions.

Mr. *Harrison* said, that as he could not understand the immediate bearings of the questions upon which the Committee were willing to hear counsel, he should decline to argue them. (1)

Mr. *Pollock*.—Then the statement upon which the resolutions are founded is abandoned.

Mr. *Harrison*.—We abandon nothing.

In consequence of the course determined on by the counsel for the petitioners, the Committee resolved to defer their decision upon the 11th, 12th, and 23rd questions; and that the Commission should issue forthwith.

Mr. *Maxwell*.—The Committee consider the Act under which this Commission is to issue a boon to the people of Ireland, and they are very anxious that it really should be a boon.

Mr. *Maxwell* reported to the House; “That one of the parties before the Committee having applied for a Commission, under the provisions of an Act passed in the 42nd year of His Majesty King George the Third, for regulating the trial of controverted elections, or returns of members to serve in the United Parliament for

April 16,
1835. Re-
port to the
House of
the issuing
of a Com-
mission.

(1) When a case is sent by a Court of Equity to a Court of Law, it is necessary to state the facts upon which the point of law arises; mere speculative, or hypothetical questions, will not be answered. 1 Jac. and W. 427. And in *Re Elsom*, 3 Barn. and C. 597, a special case was drawn up upon the relation of some true and some fictitious facts, in order to obtain the opinion of the Court; and though no fraud was intended, and an expense of 40*l.* was incurred, Lord *Tenterden* ordered the attorney to pay a fine of 40*l.* and to be imprisoned until it was paid.

1835. Ireland; and it having appeared to the Committee, from the nature of the case, and the number of witnesses to be examined relative to the objections of the petition, that the same cannot be effectively inquired into upon the said Committee without great expense and inconvenience to the parties, the Committee have thought it necessary to order, and they have accordingly made an order, for the nomination and appointment of Commissioners to examine evidence in Ireland respecting certain facts, allegations, matters, and things, referred to the said Commissioners, and specifically assigned and limited in the said order.

“That the parties interested in the said Commission have nominated two barristers, and that the Committee have appointed a third barrister as chairman, qualified according to the provisions of the said Act: and that the said three barristers so agreed upon, and consenting to act, by virtue of the said Act, became and are the Commissioners for the execution of the said order.

“That the Chairman of the said Committee has issued a warrant, under his hand and seal, directed to each of the Commissioners so appointed as aforesaid, commanding them and each of them, under the penalty of five hundred pounds, to repair to the said city of Dublin, on Saturday the second day of May next; and has addressed to the chairman of the said Commission a true copy of the petition referred to the Committee, and of the statements and lists of the parties delivered to the Committee, together with a true copy of the order made by the Committee as aforesaid.

“That the Committee have gone through that part of the said petition relative to the proof of the poll, and have referred other parts of the said petition to the said Commissioners; and they humbly ask permission of the House to adjourn until such time as Mr. Speaker

shall, by his warrant, in manner directed by the said **1835.**
Act, direct the Committee to re-assemble."

Ordered, That the Committee have leave to adjourn until such time as Mr. Speaker shall, by his warrant, direct the Committee to re-assemble; and that the Committee do meet this day for that purpose [of adjournment], notwithstanding the sitting of the House.

February 10, 1836. — The Speaker acquainted the House, that he had received a copy of the minutes of the proceedings of the Commissioners appointed to examine evidence in Ireland respecting certain matters referred to them by the Select Committee appointed to try and determine the merits of the petition, complaining of an undue election and return for the city of Dublin, and that in pursuance of the Act of the 42 Geo. III. c. 106, he had by warrant, to be inserted in the next London Gazette, directed the said Committee to re-assemble upon Monday, the 29th of February.

February 29, 1836.—Upon the re-assembling of the Committee, it was stated, that the first step ought to be to report to the House the absence of Sir R. Donkin, who, since the Committee adjourned, had vacated his seat. After some deliberation, it was resolved not to adjourn for this purpose, and the absence of Sir R. Donkin was reported to the House in the evening.

CASES UNDER THE PAVING ACTS, &c. (1)

PATRICK GALLAGHAN'S CASE.

The first objection raised under these Acts related

(1) An abstract of these Acts, and a short account of the legislation that has taken place with respect to the paving, &c. and other Acts relating to the local taxation of the city of Dublin, will be found in the Report of the Commissioners appointed to inquire into the Municipal Corporations of Ireland, presented to Parliament, and printed in 1835.

March 1,
1836.
By the 47
Geo. III.
c. 109 (L.
& P. Act),
certain
Commis-
sioners are

1836. to the admissibility of evidence to show that the appointment of the Paving Commissioners was informal, not having been made under seal, and that the assessment made by them was, consequently, invalid. (1)

directed to be appointed under the hand and seal of the Lord Lieutenant of Ireland; it was held that a rate made by Commissioners, not appointed under hand and seal, should not be impugned on account of any defect in their appointment.

Mr. *Thesiger* cited sections 6, 17, 126, and 127, of the 47 Geo. III. c. 109, and contended that it was sufficient if the Commissioners were shown to be commonly reputed to be such. If the rate was improper, or irregular, the voter might have appealed against it;

(1) The following sections of the 47 Geo. III. sess. 2, c. 109, were cited in this argument:—

Sect. 6. “That from and after the passing of this Act, it shall and may be lawful to and for the Lord Lieutenant, or other chief Governor or Governors of Ireland for the time being, by writing, *under hand and seal*, to nominate and appoint such person or persons, not more than three in number, not being members of the House of Commons, as he or they shall think fit, to be Commissioners for carrying into execution the purposes of this Act.

Sect. 13. “That all or every the power or powers, of what nature or kind soever, hereby vested in the said Commissioners, shall and may, from time to time, save as herein otherwise particularly directed, be exercised by any two or more of the said Commissioners, *either personally*, or by writing under their hands, or *under their hands and seals*, according to the nature of each particular case; and that all acts, contracts, orders, or proceedings of any two or more of the said Commissioners shall have the same force and effect, to all intents and purposes, as if done or made by all the said Commissioners.

Sect. 17. “That if in any court, either of law or equity, on any action, suit, indictment, information, or proceeding whatsoever, and whoever shall or may be the parties therein, any question shall arise concerning the right of the said Commissioners, or inferior officers, or any of them, to *hold, exercise, or enjoy* their said offices respectively, then and in every such case it shall be sufficient to prove, that such Commissioner, or Commissioners, or inferior officers, or officer, were or was, at the time in question, *commonly reputed* to be such Commissioners, or Commissioner, or officers, or officer respectively, without producing their or his patent, appointment, or commission, and without giving any evidence that they have performed respectively any of the requisites which are or may be prescribed by law to entitle them to execute the said offices respectively.

Sect. 126. “That no proceeding to be had touching the conviction of any offender against this Act, or any matter or thing to be done or transacted in or relating to the execution of this Act, shall be vacated for want of form, &c.”

Sect. 127 gives an appeal to the sessions in all cases not otherwise provided for.

1836.

or, if he chose to call in question the title of the Commissioners, he might have proceeded by an information in the nature of a quo warranto, *Rex v. Badcock*. (1) Having permitted the time to elapse, in which he might have appealed, his liability was admitted; and in any question relating to this liability, the title of the Commissioners cannot now be called in question. The note of the Commissioners appointed by the Committee upon the evidence proposed to be given is, that "it was tendered for the purpose of showing the illegality of the assessment of 1834 and 1835, inasmuch as the appointment of the Commissioners did not appear to be sealed by the Lord Lieutenant. The section on this point is directory only, and the validity of the assessment is not in law affected by this informality." It will be an extraordinary measure if the Committee over-rules this opinion.

Mr. Austin.—The Statute under which the Commissioners acted expressly excludes the attendance of counsel. The opinion they have given is not, therefore, entitled to the weight of a judicial decision. The 47 Geo. III. c. 109, distinctly requires the appointment in question to be made under hand and seal. Does the 17th section preclude any dispute of the validity of the appointment? The 17th section merely expresses a general rule of law, that all public officers may prove their authority by evidence of their having acted in the character they are reputed to fill. *Phill. on Evidence*. (2) But though this is sufficient *prima facie* evidence, it may be rebutted by evidence to show that they acted without authority, *Rex v. Verelst*. (3) The fact of Dr. Parson having acted as surrogate, was sufficient *prima facie* evidence to prove that he was

(1) 6 East, 359; *Rex v. Nicholson*, 1 Str. 299.

(2) P. 226, 7th ed.

(3) 3 Campbell, 432.

1836. duly appointed, and had competent authority to administer an oath; but upon evidence being given, that he was appointed contrary to the canon, his appointment was treated as a nullity, and the averment that he had authority to administer an oath was held to be negatived. The decision is according to the maxim, "stabitur presumptioni donec probetur in contrarium," *Walton v. Chesterfield*. (1) Under the old Grenville Act, 28th Geo. III. c. 52, the certificate of the Speaker had the authority of a warrant of attorney, but in several cases (2) its regularity was examined into before the courts would enforce it. The 9 Geo. IV. c. 22, even enacts that the certificate of the Speaker shall be "conclusive;" yet under this Act, a case is pending in which its validity is attacked. (3) The case of *Rex v. Badcock*, only proves that the Commissioners might be removed by a quo warranto; not that the evidence of the Commissioners having acted would be conclusive of their title, or that evidence to prove their appointment to be bad, ought to be rejected. The acts of the Commissioners were made without authority, and are actually void. The very authority of the Commissioners depends upon their proper appointment, and it is erroneous to call the provisions of the Act which relate to it directory. (4)

The Committee resolved, "not to permit the fact of the Pavement Rate, having been legally due and

(1) Burn's "Poor Law," 26th edit. p. 22. See *Rex v. Flisher*, Cald. 137; *Rex v. Stotfold*, 4 T. R. 588. 600.

(2) *Strachey v. Turley*, 7 East, 507; *Magrave v. White*, 8 B. and C. 412; *Ex parte Williams*, 8 Price, 3; *Gurney v. Gordon*, 9 Bingh. 37; 2 Crom. and J. 614; 3 Tyrr. 616; *Trucman v. Lambert*, 4 M. and S. 234.

(3) *Brugeres v. Halcomb*, Har. and Woll. R. 410; 3 Adol. and E. 381; 5 N. and M. 149; *Ransom v. Dundas*, 2 Hodges, 155, 3 Bing. N. C. 123.

(4) "There is a known distinction between circumstances which are of the essence of a thing required to be done by an Act of Parliament, and clauses merely directory." Per Lord Mansfield, *Rex v. Loxdale*, 1 Burr. 447.

payable by any voter, to be impugned upon the ground of the alleged informality in the appointment of the Commissioners of Pavement, and the consequent invalidity of the assessment." 1836.

Mr. *Austin* then contended, that the assessment ought to have been by a deed under the hands and seals of the Commissioners, duly stamped. It appears by the evidence, that previous to 1834 the rate was signed, sealed, and delivered as a deed; the practice was in accordance with the provisions of the Act. The rate is not a mere personal charge, but a charge upon the freehold as well as upon the person; by the 45th section of the 47 Geo. III. the landlord is assessed to unoccupied houses; and in case of non-payment of the rates, the unoccupied tenements are made "a security for, and chargeable with the same, and all arrears of such rates and assessments." From the nature of this charge, it ought to have been made by deed, under section 13, 47 Geo. III., and to have been stamped, as a deed, before being given in evidence.

March 2.
An assessment charging real property as well as the person of the ratepayer, held to be valid, though not made by deed, or, under the hands and seals of the Commissioners authorized to make it, (47 Geo. III. c. 109, s. 13.)

Mr. *Harrison* admitted, that until the year 1834 the assessment had been made by deed. By the 36th sect. however, of the 47 Geo. III. sess. 2, c. 109, it is declared, that "the rate or rates, assessment or assessments, shall be a charge upon all and singular the said houses, shops, arehouses, tenements, vaults, and cellars, and upon the several tenants, owners, and occupiers thereof respectively; and shall and may be levied and recovered half-yearly, or otherwise, as hereinafter mentioned." As a personal charge, there was no necessity to make the rate by deed.

The Committee resolved, "That the pavement rate under the 36th section of the Act is a personal charge, as well as a charge on the estate, and there-

1836. fore does not, as Mr. Austin has argued, imperatively
 ——— require to be created by deed.”

THOMAS WALSH'S CASE.

March 3. Mr. *Austin* objected, in this case, that no demand
 Demand and refusal or refusal to pay the rate was proved to have been
 to pay not made. The English Reform Act requires the voter to
 necessary place himself upon the rate, if his name is not inserted
 in order to disqualify a upon it by the overseer. It is the fault of the voter if
 voter for his name does not appear upon the list of electors.
 non-pay- ment of the his name does not appear upon the list of electors.
 paving rate. Under the Irish Reform Act, the voter has no means
 given to him to ascertain if his name is upon the muni-
 cipal rate, or when his liability to pay any rate com-
 mences, unless a demand for its payment is made upon
 him. The rate in England is also published, and
 ample opportunity is afforded to all persons included
 in it to ascertain if the rate is properly or improperly
 made. In the *Fowey case*, (1) in all instances in which
 the Committee rejected votes, because a rate had not
 been paid, a formal demand and refusal were clearly
 established. In the *Bridgewater case*, (2) the Com-
 mittee decided, that persons rated, not having paid the
 rates the day before the election, the rates having been
 legally demanded, and no fraud appearing upon the
 part of the overseers, were disqualified from voting;
 the demand they considered requisite to be proved;
 the non-payment of the rate, without a demand, not
 alone amounting to a disqualification, *Shaftesbury*
case. (3) In *Cullen v. Morris*, (4) the Lord Chief
 Justice considered a personal demand for the payment
 of rates necessary, in order to disqualify a voter who
 appeared to be in arrear. In Ireland, there is no

(1) Corb. and D. 167.

(2) 1 Peck. 108.

(3) Cor. and D. 267.

(4) Cor. and D. 171.

opportunity to appeal even against this rate, until a demand is made. If non-payment was excused in the cases cited, upon account of the voter not being informed of the charge made upon him, how much stronger is this case, the rate having been made in a minute-book of the Commissioners, without the formality of a deed, or any public notice of its existence? *Curtis v. Kent Water Works.* (1) 1836.

Mr. Thesiger.—The 54 Geo. III. c. 221, sect. 7, enacts, “that all the rates, assessments, and taxes for each year, shall be due and payable on the 5th of January therein.” A similar enactment is in the 47 Geo. III. sess. 2, c. 109, s. 40. Now the words of the Irish Reform Act, section 5, are imperative, that no occupier of a house shall be permitted to vote, unless “he shall have paid and discharged all grand jury, municipal cesses, rates and taxes, if any, as shall have become due and payable by him in respect of such premises, over and above and except one half-year’s amount of such cesses, rates, and taxes aforesaid.” The moment the assessment was made, the rate became due and payable. *Lloyd v. Heathcote.* (2)

Mr. Austin.—There is a distinction between rates that are published when made, and rates privately made, and which are not published. In *Lloyd and Heathcote* the rate was published, and the voter kept out of the way to avoid the demand. In *Cullen v. Morris*, the Chief Justice was of opinion that a demand was necessary, in order to disqualify a voter for the non-payment of a rate. Whether the rate was payable or not, or even existed, could not, in this case, be known by the voter until a demand for it was made upon him.

It was resolved—“That it appears to this Com- March 5.

(1) 7 B. and C. 314.

(2) 5 Moore, 137.

1836. mittee, that notice of liability, or demand of payment, is not, by law, indispensable to the disqualification of a voter for the city of Dublin, when such voter is in arrears of paving rate for more than six months."

March 7.
The reasons
of the Com-
missioners
for reject-
ing certain
evidence
not per-
mitted to
be read
without
reading the
evidence
connected
with them.

It was proposed to read the reasons given by the Commissioners respecting certain evidence tendered in Ireland on the part of the sitting members, but not read by their counsel to the Committee, when it was resolved—"That in the opinion of the Committee it is not competent to the counsel for the petitioner to insist upon the production of the reasons assigned by the Commissioners for the rejection of evidence, in cases where the evidence so rejected is not adduced by the counsel for the sitting members, on whose behalf it was tendered to the Commissioners."

March 7.
A second
argument
upon the
illegality of
the paving
rate per-
mitted.

The objection made on a former day, that the assessment of the paving tax was illegal, and was not in accordance with the enactments of the 54 Geo. III. c. 221. sec. 2, was a second time argued before the Committee, when it was resolved—"That after due consideration of the objections urged by the counsel for the sitting members, the Committee perceive no sufficient reason for departing from the conclusion adopted by them upon the 2nd instant, as to the validity of the assessment to the paving rate."

WILLIAM BOWES'S CASE.

March 8.
An agree-
ment be-
tween a
landlord
and his te-
nant, that
the former
shall pay
the paving
rate, will
not exempt

By an agreement with the landlord and the tenant, the paving rate was to be paid by the former. The rate became in arrear, and a question arose upon the effect of the agreement upon the liability of the tenant.

The Commissioners in Dublin, in the margin of the evidence, stated, "that no agreement between landlord and tenant can in law affect the liability of the

tenant as between him and the Paving Board. (See 1883. Lord Mansfield's judgment on the Land-tax Acts, Caldecott, 282; *Rex v. Mitcham*. *Ibid.* 379, 384, *Rex v. the tenant from disqualification upon account of its non-payment.* *Ink. of St. Lawrence*, 1 Doug. 226, notes.) On this, as a question of law, the Commissioners have no doubt, and therefore they are bound, by the 25th section of the Act, with the provisions of which they are sworn to comply, to put the evidence tendered on the rejected sheet, as totally irrelevant to the matter in issue:—"the only test of the solvency of a voter, who, under the Irish Reform Act, is obliged to register only once in eight years, "is the discharge of municipal and grand jury cesses" due and payable by him in respect of the premises out of which he voted. The words in the Reform Bill are, "legally due and payable," both on the 5th and 7th sections, and therefore the words "due and payable" in the affidavit made at the poll, as also in the affidavits made at the registry, and which is founded on these sections, must mean the same. That the paving tax, which is a municipal tax, is legally due and payable by the occupier (the voter), notwithstanding any conventional agreement or understanding that may exist between him and his landlord, admits of no doubt as a question of law."

After hearing counsel, the Committee resolved—"That no agreement between the landlord and tenant, that the landlord shall pay the paving rate, to the payment of which the tenant is by law liable, can absolve the tenant from such liability while such rate remains due and payable over and above one half year's amount of the same."

JAMES WARD'S CASE.

The 47 Geo. III. sess. 2, c. 109, section 40, enacts, March 9. that the paving tax "for each year shall be due and The non-payment of

1836. payable on the 5th of January therein, and shall be received and collected as speedily as may be after the said day ;" and by the 36th section it is directed, that the tax " shall and may be *levied* and recovered half-yearly, or otherwise, as hereinafter mentioned." It was argued, that the voter being assessed upon the 10th of January, 1835, to a sum which remained unpaid at the time of the election, was in arrear for the entire year, the assessment for a whole year being " due and payable" from him at that time. It was resolved— " That it appears to this Committee, that although the paving tax made upon January 1835, was unpaid by James Ward, still for the purpose of the franchise, it is necessary that six months' credit should be allowed, in order to involve him in the disqualifying provision." (1)

a rate due and payable for the entire year, but directed to be levied half-yearly, will not disqualify a voter if he does not owe more than the arrears of one half-year.

HUGH AMPLE'S CASE.

March 11. By the 47 Geo. III. c. 109, s. 36, it is enacted, that the paving rate " is to be a charge upon all and singular the said houses, shops, warehouses, tenements, vaults, and cellars, and upon the tenants, owners, or occupiers thereof respectively ;" and by section 42, " that where *any house or tenement* shall be let in lodgings to *different persons*, and the persons letting such lodgings shall not reside in such house or tenement, then and in every such case the persons letting such lodgings, or the immediate lessor or lessors, under

The occupier of a shop is personally liable to discharge the paving rate.

(1) The following resolutions were proposed by a member of the Committee, and negatived :—

" That the pavement rate, being legally due and payable from the date of the assessment of the rate for 1835, was due from James Ward upon the 10th of January of that year.

" That it appears, that at the time of the election James Ward had not paid the said rate over and above and except one half year's amount thereof.

" That the vote of James Ward must, therefore, be struck off the poll."

whom all the different holdings in such house or tenement shall be devised, shall be subject and liable to the payment of the said tax thereof; and if such lodgers or any of them, shall pay the same or any part thereof, he, she, or they, shall be entitled to deduct the sum or sums so paid out of his or her rent for such lodgings."

1836.

The house in which the voter occupied a shop was assessed to the paving rate, and more than one half year's amount of the rate was due at the time of election. It was contended, that as the voter only occupied part of a house, he was not liable to be charged with the tax, under the 42nd section, and that no rates were, therefore, due or payable by him. On the other hand it was said, that if the voter was the occupier of the shop, he was liable to the rate, and the premises being in arrear his vote was bad; that if he was not the occupier of a shop, he was not entitled to vote under the 5th section of the Irish Reform Act.

The Committee resolved—"That Hugh Ample, registered as the occupier of a shop and premises on which more than one half year's paving rates remain due, is not entitled to avail himself of the provisions of the Paving Act applicable to lodgers only."

Mr. *Austin* then contended, that the assessment of the house had not been made upon the proper valuation; this appears positively by the evidence. The assessment of 1834 was upon the *pavement* valuation, and it ought to have been upon that of the minister's money.

The language of the Act is clear. (1) The valuation

(1) 54 Geo. III. c. 221, s. 2, (Loc. & Per. Act.) "All such rates and assessments shall be made, levied, and assessed, in such sum and sums of money, as the said Commissioners or any two of them shall order, according to the yearly rent at which any such house, shop, warehouse, coach-house, stable, out-office, vault, cellar, shed, or stall, (as well in as out of market) or other tenement or building, shall at the time of such assessment be rated

March 12. When an Act of Parliament enables different valuations to be taken in making a rate, but directs them to be taken in a certain order (the second in default of the existence of the first, the

1836. must begin by taking the minister's money; and the reason is, that the minister's money is an exceedingly general tax. The object of this provision was, that the city should not be burthened with frequent valuations, and as there is one tax not liable to much variation, it is to be taken as a basis of valuation before any other, and if any other is taken, it must be in a certain order. The valuation upon the basis of the minister's money may retain a vote upon the poll, which may be excluded if any other basis is taken.

third in default of the existence of the first and second, and so on) a rate made upon a valuation taken out of the order directed, is illegal.

By the 37th section of the 47 Geo. III. c. 109, the Commissioners are enabled to consult the original rate for the maintenance of the minister, watch or lamp, and also the book of rates made for collecting the Foundling Hospital or workhouse money, in order to ascertain and regulate the rates and assessments that they are to make. This has not been done. Is the rate then legal? It has not been made in the manner expressly directed by the Statute. The exceptive proviso of the 5th section of the Irish Reform Act, refers to rates legally due and payable. A wrong basis of valuation having been taken, when the Commissioners were enabled to take that of the minister's money, has

or valued for the collection of minister's money; or if the same shall not have been valued for minister's money, then as the same shall be rated or valued for the collection of watch money; or if the same shall not have been valued for minister's or watch money, then as the same shall then be rated or valued for the support or maintenance of the workhouse and Foundling Hospital; or if the same shall not have been valued for any of the said purposes, then as the same shall have been heretofore respectively valued by virtue of an Act made in the Parliament of Ireland, in the 26th year of his present Majesty, intituled "An Act for the improvement of the city of Dublin and the environs thereof, by the better paving, lighting, and cleansing the same;" or of any former Act or Acts of Parliament, in the said Act of the 26th year, in the said respect mentioned and referred to, although the said Acts may not be in force at the time of such rating or valuation, or as the same shall have been valued by virtue of the said hereinbefore recited Act of the 7th year of his Majesty's reign."

destroyed the legality of the assessment, and in point of fact, the assessment does not coincide with that of the minister's money. 1836.

Mr. Thesiger.—The Committee has already decided, that as regards the rate of 1834, it became legally due by the assessment of the Commissioners. The objection to it is made too late; the voter not having taken advantage of any irregularity in the assessment, the rate cannot now be impeached. The 47 Geo. III. c. 109, s. 127, gives a right to the voter to appeal, and if the appeal is not made the rate must be held to be good. The second section of the 57 Geo. III. setting forth different valuations, is not imperative, but merely directory. The Commissioners may select one valuation in preference to another, as a mere act of discretion. (1) But, supposing that the minister's money ought to have been taken as the basis of the valuation; the assessment before the Committee has been made for a sum equal to that payable under that basis, for a larger or for a less sum. If it is equal to that payable under the valuation made on the minister's money, there is no ground of complaint; it is not said that it is a higher sum, and if it is for a less sum, how could the voter have asked for relief? The 126th section takes away the power to question the rate by *certiorari*, and the voter would not have appealed against it, because the charge upon him was less than it ought to have been.

(1) The following opinion upon this subject was given by the Commissioners, and was very correctly over-ruled by the Committee:—"This question assumes a point of law as a matter of fact. Taking all paving Acts together as in *pari materia*, and considering that the object of the Acts is the benefit of the public, the preference 'in the adoption of a basis of assessment' (alluded to in the question) is not to be considered compulsory, but directing merely; the assessment is not rendered null by the neglect of such preference." (See remarks of Lord Kenyon, 4 T. R. 368, *Rex v. Newcombe*; and the judgment of Lord Tenterden in 7 B. & C. 643, *Doe d. Byewater v. Brandeking*.)

1896.

Mr. Joy in reply.—The sole question before the Committee is not the amount of the rate, or whether, by any guess, it is equal to, or less than the sum payable upon the basis of the minister's money, but whether the rate has been legally made.

It was resolved—"That it is the opinion of the Committee, the house No. 16, Liffey Street, appearing not to have been assessed in a sum of money according to the yearly rental which the said house was, at the time of the assessment, rated for the collection of minister's money, the paving tax was not legally due and payable by **Hugh Ample**."

H. M'MAHON'S CASE.

March 13.
The party
calling a
witness
whose evi-
dence he
had except-
ed to, when
tendered by
his oppo-
nent, upon
account of
his having
come into
the room
during the
examina-
tion of
other wit-
nesses, ac-
credits him
by so call-
ing him.

In this case, a question arose upon the admissibility of the evidence of **Caleb Palmer**, who, when examined in Dublin, admitted that he had read a notice respecting the exclusion of witnesses, but had nevertheless, from curiosity, gone into the room where the Commissioners were sitting. He had been told not to come in by an inspector, but asserted, that he did not expect that by going into the room his evidence would have been refused. There had been a dispute with him upon the amount of the payment he was to receive for loss of time. Having, however, been in the room, the Commissioners placed his evidence upon the rejected sheet. Afterwards, the agents of the sitting members having called and examined him, as their witness, the Commissioners placed his evidence upon the admitted sheet.

Mr. Joy objected to the evidence of this witness. Strong reasons must be given to induce the Committee to permit the evidence to be read. The witness by going into the room was incapacitated. *Oxford*

case. (1) Though there are exceptions to the rule in 1836.
the case of agents, yet in the *Hull case*, (2) the
agent was excluded. *Southwark case*. (3) In the
Drogheda case, the evidence of Mr. O'Connell was re-
jected, because he had been into the room and prompted
counsel. He appealed to the Committee to know if a
member of the House had not a right to be present
during the proceedings, and though this was admitted,
his examination was not allowed. *New Windsor case*. (4)
[*Chairman*.—The Committee acknowledge the rule, but
wish to know the effect of the examination of the wit-
ness.] The evidence was taken *de bene esse*. The
agents would, have been grossly wanting in their duty
if they had not examined the witness. There was a
possibility that the objection made to him would not be
admitted here, and therefore the evidence was given
under protest. There was no waiver of any objection
to it.

Mr. Thesiger.—The circumstances of the case deter-
mine the application of the rule that has been referred
to. *Oxford case*; (5) *Galway County case*; (6) *King*
v. Colley; (7) in which case it was held, that when a
witness remains in court after an order for witnesses
to withdraw, the judge may still allow him to be ex-
amined, subject to observation on his conduct in dis-
obeying the order. Palmer had notice that he ought not
to come into the room, and the Commissioners exer-
cised a proper discretion in putting his evidence upon
the rejected sheet; but, when the sitting members'

(1) P. & K. 105, n.

(2) K. & O. 430.

(3) 2 Peek, 167.

(4) K. & O. 167.

(5) P. & K. 105.

(6) P. & K. 523; and see the cases cited under the title "Witness, V." in *Chambers's Dictionary of the Law of Flection*.(7) *Moody & Mal.* 329: See *Doe d. Good v. Cox*, cited in Clifford, 114; in which case a new trial was granted, upon account of the rejection of the evidence of a witness who had remained in court after a notice to withdraw.

1836. agents examined him, they accredited him as a witness. They set aside the rule upon which his exclusion rested. *Blewitt v. Tregonning*; (1) *Corporation of Sutton Coldfield v. Wilson*. (2) The cross-examination even of a witness on any matters relating to the merits of a case, makes him a good witness for the other side, though otherwise liable to exception.

Mr. Joy.—The cases cited are not to be contested, but the difference between them and the present case arises from the mode in which the evidence is taken. The Commissioners can make no final decision, and the parties before them are compelled to enter into a full examination, in order to protect themselves from the consequences that might follow any neglect in doing so. The case is analogous to a suit in Chancery, in which the evidence is taken under a Commission. In Chancery, witnesses are fully examined; but it remains for the judge to determine if the depositions shall be read. The mere fact of examination does not give validity to evidence that, by the ordinary rules of law, would be rejected. It was resolved—"That the evidence of Caleb Palmer appears to the Committee to be admissible."

FRANCIS QUIN'S CASE.

March 17.
The Commissioners ought to have referred to the poll-books in the case of each voter.

In this case, the poll-books were offered in evidence, to prove the residence of the voter, but the Committee resolved—"That in the scrutiny into any vote, the poll-books cannot be admitted in evidence unless they were, in that particular case, produced before the Commissioners. (3)

(1) 5 Nev. & M. 308.

(2) 1 Vern. 255.

(3) It was moved by a member of the Committee, and negatived—"That the poll-books having been returned to the Committee by the Commissioners must be received." See 42 Geo. III. c. 106, s. 26, and the cases towards the end of this report.

1836.

THOMAS DOHERTY'S CASE.

In this case an objection to the production in evidence of certain checks of receipts in the books of a collector of the paving-rate was made, and the Committee resolved—"That the counsel for the petitioners are entitled to produce the checks of receipts which were made exhibits by the Commissioners." March 17.

Upon an attempt to impugn the value of the check receipts, the Committee resolved—"That the checks of the receipts, having been produced before the Commissioners, and returned by them as exhibits, constitute part of 'the evidence and proceedings' on which the Committee are required 'to try and determine the merits of the petition;' and that the counsel for the sitting members must, therefore, confine themselves to the establishing of the invalidity of each document, as applicable to the proof of the particular case in support of which it may be adduced by the petitioner's counsel."

In a subsequent case, that of Bernard M'Cann, the Committee resolved—"That Beattie, the collector, whose block receipt-book is produced as the only evidence to prove the payment of the tax for 1834, subsequent to the election, not having been examined before the Commissioners, the evidence is not, in the opinion of the Committee, sufficient to disqualify Bernard M'Cann as a voter." The books of a collector, who was not examined, not permitted to be put in evidence. (In/ra, 141.)

After this decision, Mr. *Wrangham* informed the Committee that he should, the next day, proceed with the watch-tax cases. Mr. *Austin*, however, stated that it would be most convenient that the pipe-water cases should be taken first, and urged the Committee to adopt this order of proceeding. The Committee, after Counsel for the petitioners permitted to conduct the case without the interference of the Committee.

1836. retiring, informed the counsel—"That the Committee are unwilling to interfere with the usual and common practice adopted by Committees in such cases, and that they did not wish to alter the rule. They, however, wished that counsel would proceed as fast as possible; and particularly, that in matters of law they would try and arrange them out of doors, for this obvious reason, that in many of the cases it was impossible to do them justice." (1)

THE WATCH TAX CASES.

WILLIAM NOWLAN'S CASE.

Under the 48 Geo. III. c. 140, (General Act), the assessments to the Watch Tax, must receive the sanction of the divisional justices.

By the 26 Geo. III. c. 24 (Irish Act), the Lord Lieutenant of Ireland was empowered to nominate and appoint three persons, magistrates of the city of Dublin, to be Commissioners of Police; and by the 19th section, "one or more rates, as to the Commissioners shall seem meet, shall once, or oftener, in every year, if they shall see occasion, be assessed by them upon every house and tenement." By the 35 Geo. III. c. 36, section 57, a superintendant magistrate was enabled, in the place of the Commissioners, to "levy and raise, or cause to be levied and raised, in his own name, all duties, taxes, assessments, fines, and arrears, that should be then due and owing to the said Commissioners of Police, or which by law the said Commissioners ought to have levied and raised:" and by the 75th section, the churchwardens of the several parishes were to "assess a certain rate upon each house in the said district," not exceeding a certain amount, as the same had been or should be valued, for the collection of the minister's money, or the like rate on houses not so

(1) K. & O. 304. *Carlow County case*. K. & O. 456.

valued, or liable to such valuation. The 36 Geo. III. 1836.
c. 80, sect. 10 (Irish Act), also directs the church-
wardens to assess the rate. The 39 Geo. III. c. 56,
transferred to the superintendant magistrate the powers
of the churchwardens, and authorized him (section 10)
to raise and levy the like rates and assessments on all
houses within the district of the metropolis, and all
other places adjacent thereto, as the churchwardens
were by the second of the said recited Acts (36 Geo. III.
c. 80) authorized and empowered to assess, raise,
collect, and levy. This Act of the 39 Geo. III. c. 56,
was made perpetual by the 40 Geo. III. c. 62 (Irish
Act); then followed the 48 Geo. III. c. 140 (General
Act), which recites (section 102), " that it is expe-
dient that the *assessments* provided by the said Acts
of the 35th, 39th, and 40th years of his Majesty, should
be continued and amended;" and authorizes the di-
visional justices of the Castle Division, or any two
of them at the head office, from time to time " to
raise and levy the like rates and assessments upon all
houses and tenements within the said police district of
the Dublin metropolis, which under or by virtue of any
Act in force immediately before the passing of this
Act, shall be liable to be rated and assessed to any
such rate, or assessment, as the said superintendant
magistrate was, by the said recited Acts, or any of
them, empowered to collect, raise, assess, or levy."

By the 114th section, the churchwardens or vestry
clerk of the several parishes, &c. of Dublin, are di-
rected, within ten days after a proper book is sent to
them for the purpose, by the divisional justices, to
enter into the same the valuation of houses, &c. for the
minister's money; and that as often, and whenever a
valuation for the minister's money is made, within ten
days after the same has been approved of by the Lord

1836. Lieutenant, or other chief Governor, Governors, and Privy Council of Ireland, to deliver a copy of such valuation, signed by the churchwardens, to such divisional justices of the said division, or to some of them, at the head office. And the 111th section makes the certificate of the divisional justices, or any two of them, conclusive evidence of the sum at which any house is assessed.

It was admitted, that there was no documentary assessment forthcoming in evidence; but it was contended, that no such assessment was necessary, the Acts of the 39 and 40 Geo. III. having fixed the assessment and made it perpetual, and that the sums charged in the collector's books were recoverable, though such charges had not been sanctioned by the divisional justices. The Acts, subsequent to the 39 and 40 Geo. III. merely gave a power "to levy and raise" the sums fixed by the parliamentary assessment.

It was replied, that the provisions of the Acts cited require frequent assessments to be made, and that there appeared to be none in existence. The assessment when made, is not a permanent one. It is based upon the minister's money, which in 1834 was not the same as it was in 1833. The early Acts give a power to the superintendant magistrate to levy and raise sums assessed by the churchwardens, who were to assess upon valuations which, in a city such as Dublin, must necessarily be fluctuating. The 102nd section continues the power to the divisional justices.

March 19. It was resolved—"That by the Act of the 4 Geo. III. c. 140, the sanction of the divisional justice of the Castle Division is requisite for giving legality to an assessment to the watch-rate.

"That the amounts charged in the collector's books produced to the Committee, have not been proved

to have received the sanction of such divisional justices. 1836.

“That the voter cannot, therefore, be disqualified for the non-payment of the amount charged against him in the rate-book.”

In the course of the above case, it was contended, that the books of the collector ought to be produced with the evidence of the collector given upon their production before the Commissioners. The Committee resolved—“That the collector’s books should, if required by either party, be put in with the evidence of the person by whom they were produced and verified.” (1)

Books of a collector to be put in with the evidence of the person producing them, (*supra*, 137.)

PIPE-WATER RENT CASES.

FRANCIS COLEMAN’S CASE.

The first question that arose respecting the pipe-water rent was, if the same was a municipal tax under the fifth section of the Irish Reform Act?

The earliest Act relating to this tax, is an Irish Act of the 6 Geo. I. c. 16, which recites, “That whereas the city of Dublin hath for many ages passed been seized and possessed of a water-course taken out of the river Dodder &c., which is the chief supply of water, not only for the inhabitants of the said city, but also for his Majesty’s castle of Dublin, which without it would suffer exceeding great prejudice;” that the water is diverted, and certain nuisances exist, and that “most part of which water by being so diverted is lost,

March 21. The pipe-water rent of the city of Dublin is a Municipal Tax.

(1) It was proposed by a member of the Committee, and negatived—“That the collector’s books, on which John Lewis was examined, having been duly verified before the Commissioners, and returned by them as an exhibit in the case, it is competent for the petitioners to produce the books in evidence.”

1836. and never returns to its ancient course, or is greatly corrupted, so that in the summer season there is not sufficient water to serve its inhabitants, or to extinguish any fire; and forasmuch as it is of absolute necessity, that all cities and great towns should be plentifully supplied with direct and wholesome running water for the service of its inhabitants; be it enacted," &c. (1) The 15 & 16 Geo. III. c. 24, recites in its preamble, that "whereas the inhabitants of the city of Dublin have not of late been sufficiently supplied with water, which has been occasioned by the great increase of the inhabitants of the said city, and the insufficiency of the works formerly constructed to supply such a number,"—"and whereas it would tend to the health, safety, and convenience of the inhabitants of the said city, if the owner or occupier of every house in the said city should be obliged to take a leaden branch from the water mains, to supply such house respectively, therefore to enable the said lord mayor, sheriffs, commons, and citizens of the city of Dublin, more effectually to carry the said laudable purpose into execution, and that the inhabitants of the said city may have a regular, sufficient, and constant supply of water; be it enacted," &c. The 42 Geo. III. c. 92 (L. & P.), and the 49 Geo. III. c. 80, (L. & P.) extend the powers of the former Acts, and impose rates upon the owners and occupiers of dwelling-houses.

Mr. Thesiger.—The several Acts passed respecting the pipe-water rent establish it to be a tax imposed for the benefit of all the inhabitants of the city of Dublin; call it a rent, or a rate, yet still it is tax, it is a payment that is compulsory. Each inhabitant is re-

(1) See an account of the Acts relating to this class of cases, in the Report of the Commissioners to inquire into the Municipal Corporations of Ireland, (*Dublin*, part II. p. 243) presented to the House of Commons in 1836. And see *Attorney-General v. Corporation of Dublin*, 1 Bligh's N. R. 312.

quired to take a branch from the main pipes, and if he declines, he is still liable to be charged with the rent. 1836.

The corporation does not stand in the relation of a mere water company, which can only regulate their dealings upon the terms of private contracts; if it did so this would not be a municipal tax. The character of the charge is shown by the preambles of each Act, and by the payment for the ordinary supply of water being fixed and compulsory. No municipal regulation, indeed, can be more important than that which provides for the health and cleanliness of a city.

Mr. Austin.—The 6 Geo. I. c. 16, was passed for the mere purpose of cleansing the water-course of the river Dodder to the city of Dublin. It was a private water-course belonging to the corporation, though it is now contended that it belongs to the public, and that the corporation are not the owners and proprietors of it, but merely trustees. The other Acts are before the Committee, and certain rents are payable under them. Are these rents a municipal tax? Until the passing of the Irish Reform Act, the word “municipal” is not to be found in any Act of Parliament. Considerable doubt of its meaning hangs over it when used alone, and still more so when connected with other terms. The word “municipal” is borrowed from the Roman law, and “munus publicum” was defined to be “officium privati hominis ex quo commodum ad singulos, universosque cives remque eorum imperio, magistratus extraordinarium pervenit.” (1) The object of connecting a municipal tax with the franchise was its universality. The poor rate in England is connected with it for the same reason; but to be a municipal tax, these essentials must be shown to exist:—

(1) Dig. l. 50, t. 16, 239. Viarum munitiones, prediorum collationes, non personarum, sed locorum munera sunt. D. 50, l. 4, 14.

1836. 1. It must be a general and universal tax, extending over the whole city.

2. It must be levied for the general purposes of the city.

3. It must, when levied, constitute a public fund for public purposes.

Now, the pipe-water rent is only levied upon part of the inhabitants. It does not affect a warehouse, shop, or counting house, and is only leviable upon the owners and occupiers of dwelling-houses. It is perhaps only payable by one-fourth of the persons included within the enfranchising clauses of the Reform Act. The inhabitants of the streets in which there are no mains are also not liable to it. Emphatically, in the words of these Acts, the charge is a mere rent — a rent payable by persons who take branches from the mains. A municipal tax it cannot be, otherwise one class of voters will be subject to an exaction from which another, and a very large class, will be exempt. The tax also appears to extend over districts beyond the electoral district, and certain districts within the electoral district are not liable to it; by 42 Geo. III. c. 92, sect. 3, only parts of the liberty of St. Sepulchre are chargeable with it; and by sect. 23, it is extended to a district beyond the electoral limits of the city. On one side, therefore, it loses its municipal character by being more general than a municipal tax, and on the other side it loses its municipal character by not being sufficiently general. It affects only a part of the constituency, and is not within the principle of those municipal taxes to which the Legislature referred. It ought to be co-extensive with the *municipium*, and to charge all persons alike. It does not do so; one day it is in one street, and another day, by the laying down of new mains, in other streets. It has no universality;

it is an unequal charge, and it therefore fails to fulfil the chief condition of a municipal tax. 1836.

2. The tax ought to be for the general purposes of the city. This is only a tax levied for the benefit of the persons into whose dwelling-houses branch pipes are introduced: it is for the domestic purposes of certain persons who are the owners and occupiers of houses. It is true that the language of the preamble is general, but a preamble helps, and does not hurt. The preambles of these Acts are the ordinary flourish of language to be found in private Acts of Parliament. The recitals are to be judged of by the enactments, and these extend the benefits of the Acts to certain inhabitants only of the city of Dublin, for their private accommodation.

3. The tax, when levied, does not constitute part of a public fund for public purposes.

The water-course of the river Dodder is part of the private property of the Corporation of Dublin. The Corporation hold it in fee, and may charge and alienate it if they think proper. It has been attempted to control municipal corporations in the application of their funds, and to confine them to strictly public purposes; but a general right to deal with them as they may think fit, is acknowledged. (1) The Corporation of Dublin are not bound to apply the profits of their sale of water to any public object; when collected, they form part of the funds which are applicable to any private purpose. The powers given by the Act to recover these rents, are to enable the Corporation to deal with a vast body of clients with ease, without resorting to the ordinary lingering processes of law. The Acts

(1) *The Mayor and Corporation of Colchester v. Lowten*, 1 Vesey and B. 226. The Municipal Reform Acts, however, now distinctly control the application of all the funds of municipal corporations in England.

1836. conferring them, speak of the payments for water as
 ——— “rents,” and frequently refer to the “sale” of water.
 Throughout, the water is referred to as private property, and the profits of it do not constitute a fund appropriated to public objects.

A cogent reason, also, to show that this is a private and not a public charge is, that it is not recoverable at any fixed period of the year. The Pipe-water Committee may require their rents to be paid by A. B. on June 1, C. D. on July 4, E. F. on some other day, though they are only enabled to collect annual rents. One of the objects of the Reform Act was to require the payment of those taxes only which are due at fixed periods, and payable from all persons charged with them, at the same recurring times. The party using the water pays for it on the same terms and at the same times, as he would do under any private contract entered into upon any day in the year.

Thus none of the three essentials of a municipal tax exist in this case. The franchise of the city of Dublin is so clogged with numerous taxes, that the Committee ought to hesitate to connect with it a payment for the supply of water, which few persons believe to be included among the municipal taxes, with which their right of voting is connected.

It was resolved—“That it appears to this Committee that the pipe-water rent is a municipal tax.”

Non-payment of the pipe-water tax, though not demanded or refused to be paid, disqualifies a voter.

It was then objected, that it was not shown that any demand for the payment of the tax had been made upon the voter, or that there had been any refusal to pay it.

Mr. Harrison.—The 42 Geo. III. cap. 92, sect. 3, enables the Corporation of Dublin, or certain persons acting under their authority, “to demand and take” the rates or rents therein mentioned. Under the Reform

Act (section 5), the voter, at the time of his offering to vote, must have paid the amount of the rate that was due and payable by him, over and above and except one half-year's amount thereof. Now a title to demand arises out of the tax charged upon the voter being due and payable. The debt must exist previous to any right to demand it; it must be due before it can be in the power of any person to require it to be paid. *Rumball v. Ball*, (1) a promise to pay on demand was held to be debt in *presenti*, and precedent to the demand. *Lloyd v. Heathcote*. (2) More than one half-year's amount of this rate was "due and payable" at the time the voter was polled. 1836.

Mr. *Austin*.—Under the paving Act, the payment of the rate was made due and payable upon certain fixed days in the year; but in this case the time for the payment of the water rents is determined by the corporation, or by their agents; and until demand is made, the rent is not in law payable. The 42 Geo. III. c. 92, sect. 10, enacts, "That if any person or persons who-soever, subject or liable to pay any such annual rate or rents, shall neglect or refuse to pay or discharge such annual rate or rents, for the space of twenty-one days after formal demand made thereof, or in writing, left at his, or her, or their last or usual place or places of abode, then," &c. Before any of the provisions for recovering any part of the rate can be enforced, notice of its being due and payable must be given, and twenty-one days must elapse. The 49 Geo. III. c. 80, sect. 6, contains the same provision. In law the debt does not exist, nor is there any legal title to recover it until demand is made. In *Rumball v. Ball*, the promise to pay was an acknowledgment of the debt. In *Lloyd v. Heathcote*, a previous demand was not requisite.

(1) 10 Modern R. 38.

(2) 5 Moore, 137, and see *ante*. p. 126.

1836.

It was resolved—"That demand of payment is not requisite to render the pipe-water rent, 'legally due and payable' by the occupier of the house, chargeable with that tax."

PATRICK KELLY'S CASE.

Non-payment of the pipe-water rent by the occupier of a shop, part of a house charged with it, the landlord living on the premises does not disqualify the occupier of the shop.

The voter occupied a shop and premises, and was registered for the same. His landlord occupied the house or tenement, of which the shop formed a part, and was in arrear of the pipe-water rent.

It was resolved—"That as the pipe-water rent is chargeable on dwelling-houses, and Patrick Kelly registered on a shop and premises on which Power, the owner, resided, and on which he actually paid the pipe-water rent, the vote of Patrick Kelly may be allowed." (1)

JOSEPH BYRNE'S CASE.

Occupiers of parts of houses, charged with the pipe-water rent, are disqualified, in case the rent on the house is in arrear.

The voter in this case occupied a shop and premises, being part of a tenement on which the owner resided. There was more than one half-year's amount of the pipe-water rent due for the entire premises. (2)

(1) See the next case.

(2) The following reasons were given by the Commissioners upon evidence being tendered relative to this question. 5th. It is stated to the Court, by the agent for the sitting members, that the object is not to show that the voters for the sitting members were lodgers, and he disclaims their being so. Now, even supposing the lodging clause in the Pipe-water Acts to exempt any persons, it is only lodgers that are exempted; but the lodgers' clause does not *exempt* the occupier from liability. It has no negative words, or words of exemption; it is not a proviso, but an enacting clause, making the person letting lodgings, as well as the occupier, also liable. If a particular thing be given in the preceding part of a Statute (as here a power is given to levy pipe-water rent either from the owner or occupier, 42 Geo. III. c. 92, s. 3; 49 Geo. III. c. 80, s. 1) this is not taken away or altered by any subsequent general words in the same Statute, 1 Jones 26, *Sheridan v. University of Oxford*.) Here the Acts are all in the affirmative, and the latter Act, 49 Geo. III. c. 80, is only an Act amending a series of Acts in *pari materia*,

Mr. Wrangham.—The 19 and 20 Geo. III. c. 13, 1836.
 sect. 4, recites that “ many houses are let out in divers portions, lodgings, or tenements, to distinct tenants or inmates;” and enacts, that the pipe-water rent shall in such cases “ be *levied* from the owners or owner, or principal tenant of such houses or tenements, or from the occupier or occupiers of any part of such houses or tenements;” and “ such occupier or occupiers of such tenements, being parts of houses, are hereby required and authorized to pay such sums as are hereinbefore mentioned, and to deduct the same out of the rent of his or her holding.” The occupiers of parts of houses are liable to the rent, and ought to discharge the arrears due in respect of their premises before they offer to vote. The Reform Act does not enable the voter to transfer the performance of this duty upon a third person. In this case the party was registered as an occupier, and he claims an exemption under a clause relating to lodgers only. As a lodger, he was not entitled to be registered; as an occupier, he ought to have paid this tax before he voted.

Mr. Joy.—The 19 & 20 Geo. III. c. 13, s. 2, charges the paving rate upon dwelling-houses only, and the 4th section relates to the *levying* of the rates upon the tenants of parts of houses. The tenants are made

and not introductive of a new law, Co. R. *Forster's case*, Thomas's edition, p. 121, also p. 119 of same edition; *Gregory's case*, 6 Cooke, 19; 4 T. R. 3 *Williams and Pritchard* (Lord Kenyon's judgment), and the concluding words of Lord Tenterden's judgment, 7 B. and C. 643, *Doe v. Byewater and Brandeling*. 6th. If it were held that the occupier is not liable in the case of a lodging-house, then the 6th section, 49 Geo. III. c. 80 (the distress clause), renders his premises liable to distress without his having any notice whatever of their being in arrear: compare the 5th and 6th section. 7th. The 15 and 16 Geo. III. c. 24 (one of the earliest Pipe-water Acts still in force), makes the occupier, without any exception, liable to take a branch pipe from the main into the house which he occupies; and the lodgers' clause in the latter Act applies only where “ the whole house” is let in lodgings, and not where there is a principal tenant on the premises, as the voter must be taken to be.

1836. liable to discharge the rents due and payable by the owners or occupiers of the houses. The 42 Geo. III. c. 92, s. 3, enables the Corporation "to demand and take from the owner and occupier of every dwelling house" certain rates. Dwelling-houses alone are charged with this tax, and in case of payment by the tenant, it becomes a debt between him and his landlord, as a tax due and payable by the landlord. The 49 Geo. III. c. 80, s. 2, also charges the rate upon the owner and occupier of dwelling-houses; and so makes the owners and proprietors of the house, or tenements let in lodgings, liable to the payment of it. It is upon the owner and occupier of *dwelling houses* that the rate is charged, and the occupier of a shop is not liable to it. This rate was not due and payable by the voter.

It was resolved—"That it is the opinion of the Committee, that occupiers of parts of houses being liable under the Pipe-water Acts for the pipe-water rent chargeable on the premises, and it having been proved in evidence, that more than six months' arrears of rent were due in respect of the premises on which Joseph Byrne registered and voted, the vote of Joseph Byrne cannot be allowed." (1)

Upon Tuesday, March 29, Mr. Joy moved the Committee to adjourn over the Easter holidays, for the same time that it was intended that the House should adjourn, namely, from March 30 to April 11, or for a shorter space of time, if the Committee should think proper. Friday the 1st of April would be Good Friday and it would be hardly convenient to any party to attend upon the ensuing Saturday.

(1) It was moved by Mr. Rundle and negatived—"That as the pipe-water rent is chargeable on dwelling-houses, and Joseph Byrne registered at a shop and premises in which Kelly, the owner, resided, and on which he actually paid the pipe-water rent, the vote of Joseph Byrne may be allowed

Mr. *Wrangham* said, that he neither opposed nor 1836.
joined in the application.

The Committee resolved, not to adjourn for a single day. (1)

Upon March 30, the sitting members were placed in a minority upon the scrutiny.

Upon March 31, Mr. *Harrison* informed the Committee of the death of Mr. Ruthven, and that his agent would no longer appear before them.

Mr. *Joy* applied to the Committee to adjourn, and to report to the House the death of Mr. Ruthven, in order to enable time to be given to electors to come in and defend the seat that had been vacated; 9 Geo. IV. c. 22, ss. 11, 12, 42. If the proceedings are continued, the interests of parties, who are no longer defended, must suffer. The seat is not the private right of the sitting member, dependent on him, or conferred upon him for private purposes. The electors generally are concerned in seeing that it is properly filled, and they ought not to be shut out from this investigation. The

An application for an adjournment, upon the death of one of the sitting members defending the return, to enable electors to come in and defend the seat, refused.

(1) 1804.—March 28. Lord Marsham reported from the select Committee appointed respecting the return and election for the county of Middlesex, “That the counsel for the several parties had stated to the Committee, that if the Committee should obtain leave from the House to adjourn for some days during the Easter holidays, no additional expense would be incurred; but that such adjournment might be of great convenience to the parties in the further hearing of the merits of their petitions, and that the Committee, (which will to-morrow have sat eight weeks), are desirous of adjourning for some days, and had therefore directed him to move the House, that they might have leave to adjourn from the rising of the Committee to-morrow, until Monday the 9th day of April next.”

Ordered—That the said Committee have leave, for the special cause assigned, to adjourn as desired.—*Journals*, v. 59. p. 187.

May 18, 1804. Lord Marsham again informed the House, that he was directed by the Committee to move the House, that they might have leave to adjourn, from the rising of the Committee to-morrow, until Wednesday next, on account of the Whitsun holidays, such adjournment being within the consent of all parties, and no additional expense being incurred.

Ordered—That the said Committee have leave, for the special cause assigned, to adjourn as desired. [This Committee sat from Feb. 3 to July 7.]

1836. case does not in principle differ from that of a waiver of the defence by a sitting member.

Mr. *Harrison* opposed the application. The House has not the power to enable electors now to come in and defend the return. In the *Denbigh case*, 1827, (1) the Committee, under the 28 Geo. III. c. 52, refused to allow lists to be delivered by the voters taking up the defence, though the House permitted them to come in and defend the return. In a new jurisdiction, all powers that are not given must be considered to be excluded. If its authority is limited, those powers only that are within the limitation can be exercised. (2)

It was resolved—"That the Committee have been unwilling to interrupt the argument of Mr. *Joy*, in consideration of the plea, that he wished to defend the interests of the electors of Dublin; but after giving their best attention to the argument, they are of opinion that it is imperative upon them in law, and demanded of them by the interests of justice, to proceed without adjournment in the investigation referred to them."

(1) The words, "within fourteen days after the day on which any such petition shall have been presented," was inserted in the 9 Geo. IV. c. 22, sect. 11, with a provision as to the lists, in order to prevent the recurrence of an abandonment of the defence by a member, the day before the ballot, having delivered his lists, as happened in the case of the Denbigh county. From the MS. of Mr. *Harrison*, copied by his permission. See *Journals*, 1827, p. 159.

(2) An authority by commission, or other matter of record, shall be taken strictly, as well as an authority given by deed, or will of the party. *Comyn's Dig.* "Attorney" (C. 11), Mo. 217. Where a Statute limits a thing to be in one form, though it be in the affirmative, yet it includes a negative, viz. that it shall not be done otherwise, 19 *Viner's Abridg.* 511 (E. 6); 7 Pl. c. 206, b. per Saunders, C. B. in *Stradling v. Morgan*. See 3 *Viner's Abridg.* "Authority" (F) 4. Mr. Pitt, Dec. 16, 1788, upon the question of the regency, used this argument:—"If a right existed to represent the king, it must be a perfect and an entire right, a right admitting of no modification whatever; because, if any thing short of the whole power were given, it would be less than by right could be claimed, and consequently an acknowledgment that no such right existed." (*Speeches*, 3d ed. 283.)

1836.

INSOLVENT LEASEHOLDERS' CASES.

CHARLES DOWNES'S CASE.

The voter was registered in October 1832, as an elector of the county of the city of Dublin, in respect of a lease of a house and premises in Church-street, Dublin. The petition for his discharge was put in evidence, together with the assignment to the provisional assignee, the adjudication, and the order for his discharge, which was dated in August 1834.

The Commissioners made the following remarks upon evidence that was offered by the agents of the sitting members :—

“ The purpose is stated to be, to show that the voter continued in possession of the premises from the time of registry to the time of his voting. This, in the opinion of the Commissioners, is no answer to the evidence given upon the other side, of the assignment of all his property under the Insolvent Debtors' Act. The householder's franchise, under the 7th section of the Irish Reform Act, is “ use, or occupation as tenant or owner.” The affidavit of the voter is founded upon that section ; and, after his discharge as an insolvent, the mere continuance of the insolvent in possession of the premises is not an occupation of the premises as tenant, or owner, under the Reform Act.” (1)

(1) 3 Geo. IV. c. 124. s. 14.—And be it further enacted, That in all cases where the prisoner shall be discharged by virtue of the said recited Act, (1 & 2 Geo. IV. c. 59,) or this Act, and such prisoner shall be entitled to any lease, or to any agreement for a lease, and the assignee, or assignees of such prisoner, shall accept such lease or agreement, and the benefit thereof, as part of the estate and effects of such prisoner, the said prisoner shall not be liable to pay the rent accruing due after such acceptance of such lease or agreement as aforesaid, and after such acceptance, such prisoner shall not be liable to be, in any manner, sued in respect, or by reason of any subsequent non-observance, or non-performance of the conditions, covenants, or agree-

An insolvent leaseholder is disqualified, by his insolvency, to vote, though he has not been disturbed from the time of the happening of his insolvency to the time of his being polled, in the possession of his qualification.

1836. **Mr. Thesiger.**—This voter having, under the Insolvent Debtors' Act, assigned the leasehold interest in respect of which he was registered, was not entitled to vote.

By the 5th section of the Irish Reform Act, a lessee or assignee, in every county of a city, or county of a town, is entitled to be registered as an elector, who holds any lands or tenements within such city or town, for such term, of such value and subject to such provisions as would, if such lands were situate in a county at large, without the limits of such city or town, entitle such person to register his vote for such county. This qualification is particularly described in the first section of the same Act, and the voter under it must have a beneficial interest in his lease, of a certain value, above the rent and charges payable by him in respect of it, to be entitled to be registered. Under the Irish Insolvent Debtors' Act, 1 and 2 Geo. IV. c. 59, section 8, the voter assigned this lease to the provisional assignee of the Insolvent Court, in whom it vested upon the execution of the assignment; and the voter being discharged by virtue of the Act, the proviso at the end of

ments in any such lease or agreement contained; provided always, that in all such cases as aforesaid, it shall be lawful for the lessor, or person agreeing to make such lease, his heirs, executors, administrators, or assigns, *if the assignees of such prisoner shall decline*, on their being required so to do, to determine whether they will or not so accept such lease, or agreement for a lease, to apply by petition to the said court, praying that such assignees shall either so accept such lease or agreement for a lease, or shall deliver up the same and the possession of the premises demised, or intended to be demised; and the said court shall thereupon make such order as, under all the circumstances of the case, shall seem meet and just, and such order shall be binding on all parties; and, in all cases where the assignee or assignees of any such prisoner *shall refuse, or decline* to accept such lease or agreement for a lease, it shall and may be *lawful for such prisoner to surrender* such lease, or agreement for a lease, to his lessor or landlord, and such lessor or landlord, shall be bound to accept such surrender accordingly.

See the English Act, 7 Geo. IV. c. 57, sect. 23.

the 8th section, making the assignment void, in case the petition of the prisoner to be discharged under the Act is dismissed, did not take effect; no dismissal of the petition having taken place. The lease being thus assigned by the voter, he lost that title to vote in respect of which he was registered. 1836.

The General Insolvent Act in force in England, contains corresponding provisions to those referred to in the Irish Act, and the decisions made upon them show that the voter must be held to have lost the estate upon which his vote depended. *Doe d. Clarke v. Spencer*, (1) the provisional assignee under the 1 Geo. IV. c. 119, may, without an application to the Court, sue in ejectment for property assigned to him. *Doe d. Palmer v. Andrews*. (2)

These authorities prove that the estate and interest of the voter were divested by the assignment. Will it be contended that it should be shown that the lease was accepted by the assignee? In the cases of insolvency and of bankruptcy there is an important distinction upon this point. In insolvency the provisional assignee has no option to take or to refuse the lease; by the assignment he takes the whole of the real and personal estate of the insolvent; but in bankruptcy, the assignee has an option to take, or to refuse any part of the estate, and, until acceptance, the lease is not vested in him. It was compulsory upon the provisional assignee of the insolvent to take possession of the lease, and it is for the voter to show that he again became possessed of it, and registered in respect of a new title.

Mr. *Austin*.—The authority of the Commissioners is to be altogether repudiated. It is admitted that the

(1) 3 Bingh. 203.

(2) 4 Bingh. 348. See *ante*, p. 76, 77, of these Reports.

1836. voter registered in respect of the premises possessed by him at the time of polling, and there is no question raised respecting the value of beneficial interest which he must have had under the lease.

The 3 Geo. IV. c. 124, amends the previous Act of the 1 and 3 Geo. IV. c. 59, and in section 14 of the former of these Acts, are several provisions relating to leases, or agreements for leases, in which an insolvent debtor has an interest. One of three things is directed to be done, if the title of an insolvent to a lease is to be extinguished.

1. The assignee of the insolvent has an option to accept the lease, and upon its being accepted, the insolvent is discharged from any liability in respect of covenants, conditions, or rent.

2. If the assignees of the prisoner decline to accept the lease, the lessor or person agreeing to make the lease may apply, by petition, to the Insolvent Debtors' Court that possession of the premises, and the lease or agreement, may be delivered up to him.

3. If the assignees of the prisoner refuse to take the lease, or the agreement for a lease, it is lawful for the prisoner to surrender the lease or agreement to his lessor, or landlord, who is bound to accept the same

This case must come under the third of these provisions. The prisoner was discharged in August 1834; at the time of his voting, the assignees had not availed themselves of the option given to them, nor had the lessor availed himself of his option, nor had the prisoner surrendered his lease. The voter, therefore, continued to the time of his voting in possession of the qualification upon which he was registered. His estate was never changed. The assignee and the landlord, not taking the option given to them, took no interest in

the lease, and the tenant remaining in possession, continued the connection that existed between him and his landlord. 1836.

Upon the discharge of the insolvent, an assignment of his real and personal estate must have been made to his assignees by the provisional assignee of the Court; but the 14th section of the 3 Geo. IV. c. 124, is unmeaning if the lease was taken from the voter by the assignment. If the lease was possessed by the assignee, how could the insolvent compel the surrender of it, after its acceptance had been declined? Or how could it be said to be in the possession of the assignees, when it is only upon the expression on their acceptance of it that it is to be considered to be within the operation of the assignment? In *Lindsay v. Limbert*, (1) it was held that the general assignment of the provisional assignee to the ultimate assignees, did not vest in the latter a term of years, unless by some unequivocal act they manifested their acceptance of it. So also the general assignment of a bankrupt's estate under his commission, does not vest a term in his assignees, unless some act is done to manifest an acceptance of it; and until some act of the kind is done, it remains in the possession of the bankrupt, *Copeland v. Stevens*. (2) How then can it be held here, that the term passed out of the possession of the insolvent, until the option of the assignee to take it was made? Is there any evidence of acceptance? Upon the contrary, the lease does not appear to have been disposed of, and the insolvent continued in possession. If the lease had been accepted, the qualification of the voter would have been put an end to, but continuing in possession under his old title as tenant of the original landlord, no new registration was requisite, and the franchise he had acquired remained with him.

(1) 12 Moore, 209.

(2) 1 B. & Ald. 593.

1836. Resolved—"That it appears to the Committee that a leaseholder having become insolvent, and being divested of the leasehold property on which he was registered, by the assignment to the provisional assignee previous to voting, is disqualified, and that therefore the vote of Charles Downes cannot be allowed."

The votes of several other leaseholders were then struck off by consent.

INSOLVENT HOUSEHOLDERS' CASES.

CHARLES HYLAND'S CASE.

April 6.
An insolvent householder, who has not been disturbed in the possession of his qualification on account of his insolvency, is entitled to vote.

The voter registered as a householder, and was at the time of polling in occupation of the house in respect of which he was registered. His assignment, the orders of the Insolvent Debtors' Court, and his discharge, dated April 12, 1834, were given in evidence. The Commissioners, also, made the same remarks upon the evidence given in support of these voters, as they made in the cases of leaseholders.

Mr. Thesiger.—It is stated, that this class of cases differs from that of the insolvent leaseholders. There is no distinction between them. The franchise of the householder is not acquired by mere occupation independent of the character of owner or tenant. The fifth section of the Irish Reform Act does not authorize a mere occupier to be registered as an elector. This voter ought to have had an interest as owner or tenant in the premises in respect of which he was registered, and he ought to have been in possession, without interruption, of this interest, from the time of his being registered to the time of his being polled. If his occupation within this period was disturbed, or suspended, he ought to have been re-registered before he could

properly have been admitted to vote. According to the oath in Schedule B of the Irish Reform Act, he must swear that "my qualification as such registered voter still continues;" it must continue without interruption from the time of registration to the time of polling. 1836.

What is the difference between this case and that of an insolvent leaseholder? It can only be in the duration of the term for which the premises were held. One has a lease for several years, and the other from year to year. [Mr. Young.—Had not the leaseholder a beneficial interest in his term?] The tenant has an interest in this case, which was included in the assignment. The question in the Downes's case was, whether the legal estate had passed to the provisional assignee, and vested in him. It is the same question in this case. A tenant-right of every kind passes by the assignment, its general words carrying every thing. Every particle of interest to which the insolvent is entitled, however small, is included in it. It is rather startling to suggest, that under any circumstances an insolvent should be permitted to vote. Insolvency is a circumstance that in itself would create a strong inducement to resist the title that is set up.

Between the assignee, however, of the prisoner and the provisional assignee, there is an important distinction. The former possesses certain discretionary powers, the latter possesses none. The provisional assignee is the mere officer of the court; he has no option of any kind, and absolutely divests the insolvent of all the interest he may have in any property, no matter of what kind or description. The estate of the insolvent, his interest as tenant, is taken by him, and the insolvent thereupon ceases to fill the character of either owner or tenant; his mere personal occupation is

1836. clearly insufficient to support his title to be upon the register, or to possess the franchise. *Doe v. Andrews*; (1) *Topham v. Dent*. (2)

Supposing it can be shown that a new tenancy was acquired, either through the provisional assignee, or through the landlord; yet still, by the assignment, the tenancy of voter was broken, his qualification was at an end, and if his estate afterwards revived, still, before he could vote, he ought to have been re-registered.

Mr. *Joy*.—In the case of insolvent leaseholders, the lease was enumerated in the particulars of the schedule.

Mr. *Thesiger*.—There is no enumeration of the house of the voter in his schedule, but the schedule is of no importance in the decision of this question. By the assignment to the provisional assignee, every thing passed, including in it the estate of the tenant in the house he occupied. The discharge completed the effect of the assignment.

Mr. *Joy*.—It has been endeavoured to destroy any distinction between this case and that of a leaseholder, though they materially and essentially differ. A leaseholder votes in right of a lease, in which he must have a beneficial interest of the value of 10*l.* a-year; a householder may, upon the contrary, occupy his house at rack-rent, and yet be entitled to vote. The words of the Bankrupt Act are, *mutatis mutandis*, the same with the 14th section of the Insolvent Act; and in the *Worcester case* (3) it was held, that unless there was an acceptance of the lease by the assignee, the estate remained in the bankrupt. Here no change has been shown to have occurred in the relation of landlord and tenant. There was a continuous possession,

(1) 4 Bingham, 348.

(2) 6 Bingham, 515.

(3) K. & O. 241.

commencing under the original agreement, and no act has been done by any party to disturb the occupation. 1896.

Camelford case; (1) the voter was objected to upon the ground that he did not pay scot and lot; a commission of bankruptcy had been issued against him; the voter was uncertificated, and his estate was not solvent, yet the vote was retained on the poll. *Doe dem. Andrews*; *Wheeler v. Bramah*; (2) *Welch v. Myers*; (3) *Lindsey v. Limbert*. (4)

It is not shown that the voter has ceased to pay taxes or rates. If they had been paid by the assignees, it would have amounted to an acceptance of the premises by them; but if they were paid by the voter, his possession must be inferred not to have been permissive, but to have been that of a tenant. The premises in respect of which this voter qualified, were not included in his schedule, and the presumption that arose from the possession of a beneficial interest, in the case of leaseholders, cannot arise in this case.

Mr. Theisger.—As to non-payment of taxes, there is no objection made upon that ground. It must be assumed that they are paid, though there is no evidence that they were paid, or by whom they were paid. The objection against the voter rests upon the effect of the assignment to the provisional assignee. In the cases cited, it was shown that the assignees, who had to elect whether they would take the lease or not, had made an election. These cases are not to be disputed, and do not affect the question under consideration. The estate of the insolvent passed by the assignment to the provisional assignee, and thus destroyed the validity of the registration of the voter. The fact of the house not being described in the schedule is imma-

(1) Corb. & D. 256, 257.

(2) 3 Camb. 340.

(3) 4 Camb. 368.

(4) 12 Moore R. 209, *ante* 157.

1836. terial. The omission does not exclude it from the operation of the assignment. If the tenant was rack-rented, and had the minutest interest in the house, the assignee would take it. The estate of the tenant passed to the provisional assignee, and from that moment his right to vote ceased.

Resolved—"That it does not appear to the Committee that the assignment by an insolvent householder of all his real and personal estate and effects to the provisional assignee, necessarily involves his being divested of the character of tenant, as described in the 5th section of the Irish Reform Act; and that Charles Hyland being admitted to have continued up to the period of the election in occupation of the house on which he registered, and no proof having been adduced to show that the tenancy required by the Reform Act had been at any time abandoned by him, the vote must be allowed." (1)

(1) In this case it was moved and negatived—"That Charles Hyland, by assigning to his provisional assignee, all his property, including that on which he registered, is thereby disqualified." Had this resolution been passed, these cases of insolvent leaseholders and of insolvent householders would have been consistently decided. It is certainly difficult to contend that they are to be reconciled. The tenants in both cases were possessed of a lease, in both cases they made an assignment of their real and personal estate, and continued in occupation of the premises for which they were registered, to the moment of polling. The effect of the assignment upon the tenancy must be considered to have been the same in both cases. The duration of the estate, or even its beneficial nature, could not affect the legal operation of the assignment, though a member of the Committee, referring to the presumed beneficial interest possessed by the leaseholder, appears to have considered that it constituted a distinction between the cases. If the decision depends upon the mere operation of the assignment to the provisional assignee, the resolution respecting the leaseholders ought to have been extended to the householders. The beneficial interest of what is conveyed, is a consideration that cannot be regarded previous to the assignment. The *provisional* assignee takes all the estate of the insolvent of every kind, without being able to reject any portion of it. Whether there be a lease for a year, or for a term of years, the effect of the assignment must be the same. If the insolvent is divested of the estate in the one case, he is also divested of it in the other. The leaseholder voted as lessee for a term of

1836.

GEORGE COWAN'S CASE.

In the former case of insolvent householders, it was admitted, that the voter continued in occupation of his house from the time of registration to the time of polling. In this case there was no such admission.

Mr. *Hutton*.—The assignment is *prima facie* evidence that the interest of the voter passed under it, and that he ceased to occupy the house. [Committee.—The presumption is, that the voter voted in respect of the same premises for which he registered, and that he continued to occupy them, otherwise he would be liable to penal consequences.] In other cases the presumption has been against the vote. [Committee.—The decisions of the Committee, that a tax was due and payable by the voter at the time of the election, the non-payment of which is a disqualification, did not imply that perjury had been committed by the voter, but only that he had been mistaken respecting his liability.]

It was resolved—"That the case of George Cowan falls within the scope of the resolution of the 6th of April, unless the counsel for the sitting members are prepared to prove the surrender of a beneficial interest by the assignment to the provisional assignee."

JAMES JONES'S CASE.

In this case the discharge of the insolvent did not take place until after the election, and it was contended, that as the assignment was conditional, and

April 14.
To disqualify an insolvent householder, the surrender of a beneficial interest in the premises in respect of which he is registered, must be proved.

April 14.
The discharge of an insolvent is not necessary in order to give effect to the assignment to his provisional assignee.

years; the householder voted as lessee from year to year. The quality of the estates was the same, though their duration differed.—The 14th section of the 3 Geo. IV. c. 124, however, certainly throws some doubt upon these cases, when considered independently of the supposed effect of the assignment.

1896. was only rendered valid by the discharge of the insolvent, the property of the voter was not absolutely passed to the provisional assignee at the time the voter polled, and that therefore the vote was valid.

Mr. *Thesiger*, however, remarked that he could not support the vote, and it was therefore struck off.

CITY GRAND JURY CESS CASES.

JOHN CAVANAGH'S CASE.

The statement of the sitting members, containing an allegation "that a cess was of right due and payable," held to be an admission of the cess being in existence, and being properly made, and therefore to preclude the necessity of the petitioners giving any evidence of the assessment of such cess.

Mr. *Wrangham* contended, that in this case no question could be raised upon the legality of the Grand Jury assessment, and proposed to read the opinions of the Commissioners.

Mr. *Austin*.—The Committee has determined, by their decision of March 7, that no opinion of the Commissioners shall be read unless in connection with evidence that occasioned the expression of the opinion.

It was resolved—"That the resolution of the 7th of March referred to a case in which the Commissioners had taken evidence, and placed it upon the rejected sheet, and that the production of such evidence was, consequently, at the option of the party by whom it was tendered; but as, in the present instance, the Commissioners appear to have refused altogether to examine evidence, the Committee feel it to be a duty incumbent upon them to require information as to the reasons for the adoption of such a course."

The arguments of counsel will be excluded in cases which do not raise any general principle, or doubtful points of law.

To the last resolution, the Committee added—"That the Chairman be requested to communicate to the learned counsel the feeling of the Committee, that without undervaluing the importance of their arguments, or intending to convey any imputation of unnecessary consumption of time, it has become absolutely essential that some new plan should be devised

for progressing the inquiry with greater rapidity ; that, 1836.
for this purpose, he be further requested to suggest the
expediency of counsel abstaining from all comment
upon evidence in cases of scrutiny into individual
votes, not involving any point of law or question of
general principle ; confining themselves, in such cases,
to reading such portions of the evidence as they may
deem necessary to the elucidation of the facts of the
case, and laying before the Committee such documents
as may appear to them essential to its proof."

The following reasons given by the Commissioners,
upon refusing evidence respecting the legality of the
assessment, were then read :—

" 1. It is not competent for the Commissioners, under the provisions of the Act under which they sit (42 Geo. III. c. 106), to examine for the purpose of impeaching the assessment ; because it is expressly admitted, in the statement of the sitting members, that there was a legal assessment ' which were [cesses] of right, due and payable by some other person.' The cess could not be due and payable by some other person, unless there was a legal assessment. The statement, therefore, of the sitting members admits that there was such legal assessment, and only controverts that their voters were liable to pay the cess. In the Paving Case, the statement of the sitting members charged, expressly, that the assessment was not duly made, therefore the Commissioners took evidence at great length as to this.

" 2. One of the lists of objected voters given in by the sitting members, of persons who voted for West and Hamilton, charges them with being in arrear for the grand jury cess, due and payable by them. This also admits that there was a legal assessment of the same. The third section of the 42 Geo. III. c. 106, expressly forbids that any witness shall be examined to any matter or thing not specified or contained in the petition, statement, or lists respectively. It forbids, *à fortiori*, the examination of a witness to a matter expressly excluded by the admission of the sitting members in their statement.

1886.

"3. It is doubtful whether, under any circumstances, it would be competent to impeach the applotment for informality, supposing such to exist; the voters are themselves parties to the same. Every person of every religious persuasion has now, by the 4 and 5 W. IV. c. 90, a vote at vestry at such applotment; and, moreover, the words of the Applotment Act, 33 Geo. III. c. 56, are *directory* only, *Quin v. Aldwell*. (1.) Upon this ground, even if it were competent to the Commissioners to examine evidence, it would be placed upon the rejected sheet as inadmissible in point of law."

Mr. Wrangham.—The ground of refusal to receive certain evidence was, that it did not relate to the matters in issue between the parties; the Commissioners were, therefore, bound to exclude it. In the statement made by the sitting members respecting some taxes, they object to them as not being municipal taxes, or that they were not duly assessed. With respect to such taxes, the Commissioners received evidence in support of the objections. The silence in the statement of the sitting members of any similar objections to this tax, excluded their being made before the Commissioners. The statement does not contain any expression disputing the validity of the grand jury cess. The legality of the assessment not being put in issue, it cannot be impeached, and the evidence tendered with a view to impeach it, was properly excluded.

Mr. Austin.—The evidence offered to the Commissioners was for the purpose of impugning the legality of the rate. The Commissioners say, that they were precluded from receiving evidence upon this point, because it is admitted, by the statement of the sitting members, that the cess was valid. All that is contemplated in the statement is, that if the cess was due or payable, the voter was not disqualified. It is founded upon an admission that is hypothetically put. It does not

(1) Batty's R. 339.

cure the non-performance of a statuteable duty in the levying of the tax. The Committee must have it shown to them that a good rate was made before they can say it became due from any voter. If an unnecessary statement was made in the Paving Case, it ought not to be binding in this case. An excess in the fulness of description of one objection, does not afford any reason to compel an excessive fulness of description in another.

The admissions in the statement cannot, even treating them to be admissions, without qualification, be considered to support the case of the petitioners, or to exclude the necessity of their giving any evidence, which in the absence of our statement they would be required to give. We object to insolvents as well as the petitioners, but it is not a conclusion to be made from our statement, that insolvents are necessarily disqualified. Our counter-statement is not a series of admissions of which the petitioners can avail themselves. The third section of the Act directs, "That the said parties shall interchange, with and among each other, statements in writing of all particulars respecting any right of voting, or of choosing, or nominating a returning officer, and respecting all such other matters and things as either of the said parties mean to insist upon, or to contend for, or to object to; and that no witness or witnesses shall be called or examined, by or on behalf of either of the said parties, before the said select Committee, or before the said Commissioners, or either of them, to any matter or thing not specified and contained in the said lists or statements respectively; or in the petition complaining of the election or return in question." Each party is to exchange his statement and to specify the particulars of his own case; but it has never before been ima-

1836. gined that the statement of the sitting members admits the allegations in the petition of those who contest the return. The case of the defence is distinct in itself, it does not contain any denial, or put in issue any of the allegations of the petition. There is no answer required from the sitting members to any charges made in the allegations of the petition, and it is only in admissions made in course of the investigation of such allegations, that any foundation for the opinion of the Commissioners could be found. The petitioners must establish their case by their own evidence. The sitting members admit nothing; they do not reply to any charge, but put in a counter-statement containing new charges and new allegations. They are bound to produce distinct evidence to prove every portion of their statement; and in the instances in which this is not done are those in which evidence upon similar points in the petitioners' case have failed to influence the Committee. At the commencement of these proceedings each party handed in a copy of his statement. This was the first moment that either party knew what objections his opponent would insist upon. No opportunity was previously given to them to deny or to admit any thing. The statement of the sitting members is not offered as, or pretended to be, an answer to any charge. How then can it be treated as an admission of facts, which we are unable to tell whether or not they will be found to be mentioned or referred to in the statement of the petitioners? Nothing is known of the contents of the statement of the petitioners, until after the counter-statement of the sitting members is out of their possession.

The third reason of the Commissioners is equally invalid as the two first. They cite in support of their opinion an Act of Parliament, which actually did not

receive the Royal assent until the 15th of August, 1835, nearly six months after this Committee was appointed. The cess was assessed in Easter 1834, or above eighteen months before the Act was passed. The opinion, also, that a rate-payer cannot contest the validity of a rate, or impeach the assessment or applotment, is clearly erroneous.

The petitioners say, that certain voters have not paid the grand jury cess. How is this to be proved but by first showing that a valid cess was made? If there is no valid cess, the payment of it could not be enforced.

It was resolved—"That as no intention of impeaching the general legality of the assessment of the grand jury cess was contained in the statement of the sitting members, the Committee cannot now, under the provisions of the third section of the 42 Geo. III. c. 106, require counsel for the petitioners to prove that legality; but they will give due consideration to any facts that may be submitted to them, from the evidence or documents to which their attention may be directed, for the purpose of guiding their decision as to the validity of the charge upon the voters objected to."

After the last resolution was read, it was asked, if any objection to the voter being struck off for arrears of the grand jury cess, was made.

Mr. *Austin* objected to the rate.

Mr. *Young*.—The general legality of the rate cannot be questioned.

Mr. *Thesiger*.—You may turn to any part of the evidence to show that it is bad, otherwise you cannot object to it.

Mr. *Young*.—The objection to the rate ought broadly to have been set forth in the statement of the sitting members.

1836. *Mr. Wrangham.*—The Committee having resolved that we are not called upon to prove the legality of the rate, it only remains to us to answer any objection appearing on the evidence that may be made to it.

A rate directed to be made by the minister, churchwardens, and inhabitants of a parish, need not be signed by the minister.

Mr. Austin stated, that the 33 Geo. III. c. 56, (Irish Act) sect. 5, directs, that within fourteen days after the receipt of a warrant for the purpose, the ministers and churchwardens of the parishes of the city of Dublin, are directed to convene a vestry of the inhabitants of their parish, to applot and assess upon the solvent inhabitants, the proportions that they are to contribute of the grand jury cess, and objected, that the rate or assessment in this case was not signed by the minister.

Mr. Wrangham.—The words of the Act are, “in case the minister, churchwarden, *and* inhabitants, shall refuse or omit to assemble and applot.” The inhabitants are not distinguished from the minister. The applotment or rate must be the act of the vestry assembled, but no signature to it is required.

Mr. Young stated, that it was the opinion of the Committee, taking a view of the whole case, that the signature of the minister was not necessary, and that it only required the signature of some persons present at the vestry to authorise it.

JOHN MORRIS'S CASE.

The grand jury cess is a personal charge upon the solvent inhabitants of houses.

The voter lived at 27, Dawson-street. One Doyle was the person rated, and the grand jury cess charged upon him was unpaid. The name of the voter not appearing upon the rate, it was contended that he was not liable to pay the cess.

Mr. Wrangham.—John Morris is the occupier of the house, and was liable to pay the cess. By the

36 Geo. III. c. 55, sect. 95, (Irish Act), (1) the grand jury cess is a charge upon the person occupying the premises rated. The minister's money is the basis of the applotment (33 Geo. III. c. 56, s. 2.) That money is a charge upon houses, and it is taken as a guide by which this cess should be both applotted and levied. The house is in this case charged, but in the rate there is an omission of the name of the voter. This omission will not affect the liability of the voter to pay rate upon the house, which is payable by the solvent inhabitant of it. (33 Geo. III. Irish Act, c. 56, s. 5.) 1836.

Mr. Austin.—Doyle is the person rated, and if there is a Doyle connected with the house, he is liable to pay the cess. This is a rate upon the person in respect of the house; it is a rate upon solvent inhabitants. In other cases the assessment was upon the houses alone, and the 15th section of the 33 Geo. III. c. 56, is framed with reference to this distinction. Is the cess, in case of non-payment, to be raised by distress and sale of goods in the houses of the persons rated? No; but by the sale of the goods and chattels of the persons rated, and the liability to distress arises from personal refusal to pay. The 36 Geo. III. c. 55, does not apply to this case. It is an act for the amendment of public roads in Ireland, and the section cited refers to the occupiers of land.

It was resolved — “That it appears to this Committee, that the grand jury cess is a personal charge upon the individual upon whom it may be levied, and that, as it has not been proved that any applotment was made on John Morris, his vote must be allowed.”

(1) Hudson's Law of Electors, p. 121.

1836.

TENANCE BRADY'S CASE.

April 8.
If a party
charged
with the
grand jury
cess is re-
turned
upon the
list of in-
solvents, by
the collec-
tor, he is
discharged
of the ar-
rears due
in the term
to which
the list of
the collec-
tor relates.

This voter was returned by the collector upon the insolvent list. A demand upon him for the grand jury cess was made at Easter 1834, and the arrears then unpaid were not carried on in the Michaelmas book. The accounts of the collectors are closed four days before the essoign day of Easter and Michaelmas terms, and are lodged with the treasurer, together with a list of defaulters. (33 Geo. III. c. 56, s. 7.) The arrears of these defaulters are formed into two lists, entitled the Solvent and the Insolvent arrears. The solvent arrears are collected under new warrants, and insolvent arrears are re-applotted upon the parish. (Sect. 13.)

Mr. Austin.—In this case the party having been returned upon the insolvent list, and there having been no re-applotment of the cess upon him, he is discharged of the cess with which he was charged. Unless a party who is in arrear is returned as solvent, and his arrears are directed to be collected under a new warrant, he cannot be called upon to pay the arrears. His liability ceases if he is returned insolvent, and no re-applotment is made upon him. Admitting, therefore, that Brady is assessed in the Easter book, and that the cess is unpaid, his vote cannot be struck off. The principle of the Act is, that it is a charge upon solvent inhabitants. As soon as a party charged ceases to be solvent, the tax is no longer payable by him. The sum charged upon insolvent persons are re-applotted upon solvent persons, and the arrears due by solvent persons are to be levied under new warrants.

Mr. Wrangham.—There is nothing in the Act which makes the collector a judge of the solvency of an inhabitant. It would lead to great abuses if his returns

were to be treated as conclusive. He obtains a shilling upon every 5*l.* of the collection; and if he could, as he pleases, place inhabitants upon the insolvent list, he would have an interest to have the applotment of the tax upon wealthy persons, from whom it could most readily be obtained. The opinion of the collector is not final. His affidavit is made to entitle him to his discharge for the monies collected, and is not conclusive of the truth of any facts stated in his returns. (1)

It was resolved—"That from a careful examination of the collector's book and warrants, it does not appear to the Committee to be satisfactorily established, that more than one half-year's grand jury cess were legally due and payable from Tenance Brady at the time of the election."

At the request of Mr. *Wrangham*, the Committee explained this resolution, and resolved—"That the resolution of the Committee in the case of Tenance Brady was founded on the proof afforded by the collector's books and warrants, that no arrears of grand jury cess were charged against him at Michaelmas 1884; and considering the evidence in that particular case concluded, they are of opinion, that unless it is intended to raise any other objection to the vote of Tenance Brady, it must be allowed; but counsel will, of course, not be precluded from raising, in the case of

(1) "It has been shown in evidence before us, that very considerable injustice arises to some of the citizens from the conduct of the collectors in making out the lists as to arrears, in which, for the information of the grand jury, they distinguish between solvent and insolvent arrears. The solvent are returned to the collectors with new warrants to be collected from the individuals owing them; but the insolvent arrears, under the 47 Geo. III. c. 74 (?) are presented over again, to be re-applotted upon the parish. The insolvent arrears frequently amount to very considerable sums. It appears that houses are frequently returned in the insolvent list which belong to persons not insolvent, and in which property could be found to discharge the tax."—Municipal Corporation Commissioners' Report, p. 107.

1836. any other voter, any points which they may consider
 — not to have been sufficiently adverted to in the present
 instance.”

EDWARD COYNE'S CASE.

April 8. This voter was charged with grand jury cess at
 The solvent Easter and Michaelmas 1834, but he was not returned
 arrears of in the insolvent list for either term. The sum charged
 of the grand in the Easter book had not been paid, and in the
 jury cess in the Michaelmas book he was charged the amount of only
 must be re- one half-year's assessment, the previous arrears not
 applotted in order to be being carried on against him.
 due and payable.

Mr. *Wrangham*.—The voter is still liable to pay the arrears of the applotment made at Easter term. He is charged at the following Michaelmas, and, therefore, the vestry could not have considered him to be insolvent. In the case of solvent persons, the warrant continues in force until the sums mentioned in it are collected (33 Geo. III. c. 56, ss. 7. 13.) The collector is bound to give and deliver with his accounts an affidavit of all sums received under the then warrant, and also on account of former warrants. (1) When a party is once charged, he can only be discharged by payment, or by an express release. The fact of a release can only be shown by his being placed upon the insolvent sheet; but insolvency, in this case, is negatived by the subsequent rating of the voter, and he is not shown to be upon the insolvent list. If the arrears were not binding, it would be unnecessary to collect under former warrants.

Mr. *Austin*.—No re applotment was made upon this voter of his arrears, and therefore the collector could

(1) The language of the Act respecting the collection of arrears is, perhaps, irreconcilable, and the same difference of opinion, in the explanation of it, to be found in these arguments, will be found in page 107 of the Report of the Corporation Commissioners.

not demand their payment. The provisions of the 1836. Act are complex, but the churchwardens are directed (sect. 13) to "re-applot arrears." The arrears due by a solvent person must be re-applotted, or the arrears are gone. Supposing Coyne was solvent, the arrears could not be collected from him without re-applotment. If they had been re-applotted, they might have been collected; and it matters not whether the voter is solvent or insolvent, if the arrears were not re-applotted.

It was resolved—"That the arrears of grand jury cess due from Edmund Coyne, for the assessment made upon him at Easter Term 1834, not having been re-applotted at Michaelmas 1834, the amount of such arrears was not legally due and payable by him at the period of the election, and that one half-year's assessment only being at that time recoverable from him, he is not disqualified."

TERENCE M'GUIRE'S CASE.

In this case the solvent arrears of the grand jury cess was re-applotted upon the voter by the collector, and not by the churchwardens. (33 Geo. III. (I. A.) c. 56, s. 13.)

Mr. Wrangham.—In this case, instead of the churchwardens re-applotting the arrears, it was done by the collector, but the evidence given must satisfy the Committee that it was done with the assent of the churchwardens. The defect, if any, in the applotment, is hardly to be regarded, since the arrears have actually been paid by the voter. The entry was a mere ministerial act. The lists of solvent and insolvent persons had been delivered in, and a new applotment of the arrears mentioned in the solvent list was made. The proceedings were acknowledged by the churchwardens, the Lord Mayor signed the warrant, and payment was subsequently made by the voter.

1836.

Mr. Austin.—The fact of the voter having paid the cess since the election, will not interfere with the consideration of the legality or the illegality of the rating. The facts are clear. There were solvent arrears due by the voter on the Easter assessment, and at Michaelmas there was no re-applotment. The arrears were not entered up until the election commenced. The warrant is dated the 15th of January, or three days after the election began. The collector was incapable of making the re-applotment; and this case goes to the length of affirming, that the collector may re-applot at any time before he gets his warrant. Now the 33 Geo. III. c. 56, s. 4, requires the treasurer of the public money of the city of Dublin, *within ten days* after every Easter and Michaelmas Term in every year, to applot and assess upon the several *parishes*, such public money as shall, from time to time, be presented to be raised by the grand juries. He is then to insert in warrants the applotment and assessment, which warrants are to be signed by the Lord Mayor, and are to be delivered to the churchwardens. The churchwardens, *within fourteen days* after the receipt of such warrants (sec. 5,) are to convene a vestry of the inhabitants of their parish, to applot and assess upon the *solvent inhabitants* the sum applotted by the treasurer upon the parish. And *within ten days* (ss. 5, 13.) after the churchwardens have delivered to the treasurer a copy of the applotment, including the re-applotment of solvent arrears, the Lord Mayor, at the instance of the treasurer, issues his warrants to the collector to collect the sums mentioned in such warrants.

The duty of the vestry is to re-applot, the collectors have not the power to do it. There is no rule more rigorous in law than that no tax can be levied but according to the precise directions of the Act of Parlia-

ment which authorizes it. Here there was no legal re-applotment, and therefore no money was collectable. If the collector has the power to applot, he would not be a mere ministerial officer, performing a mere ministerial duty, but would have a power of adjudication. 1836.

Look too at the evidence of the collector, which was read to show that, more or less, most of the collectors were connected with the defeated candidates. Before, after, and during the election, they gave the greatest assistance to the candidates by checking off solvent arrears. No stronger fact can be offered of the danger of sanctioning this applotment by the collectors. These officers are admitted to be orangemen, purplemen, masters of lodges, and were combined together to defeat one set of candidates. The churchwardens are appointed in vestry, and are to make the applotment in vestry, but the collectors are appointed by the grand jury, and the grand jury is nominated by the sheriff. The acts of the churchwardens; and of the collectors are not likely to be similarly influenced, and the law having required that this charge upon the voters should be publicly made, will it be considered sufficient if privately made by the collectors?

Resolved—“That it is the opinion of the Committee, that the re-applotment of the arrears of grand jury cess, for Easter Term, made on Terence M'Guire, was sufficient to render the amount recoverable from him under the warrant of the Lord Mayor.”

Mr. *Austin* then objected, that as the warrant was dated upon the 15th, and the voter polled upon the 16th of January, it could not be presumed that the warrant reached the hands of the collector sufficiently early to make the sums charged against the voter payable at the time of polling.

1836. *Mr. Wrangham.*—The debt due by the voter accrued immediately upon the applotment, independent of the warrant, which was merely a mode to enforce payment. The warrant was issued the day previous to that on which the party polled, and consequently he could not swear that more than the amount of one half-year's amount of the tax was not due. As soon as the applotment was made, the sum charged on the voter was due, and an authority to collect it was obtained before the voter polled.

Mr. Young.—The treasurer is bound to send the applotment to the churchwardens within ten days after term, and the minister and churchwardens must convene the inhabitants within fourteen days; but it is not made compulsory upon the Lord Mayor to issue his warrants within any given time. (*Quære*, see sec. 13.)

Mr. Austin.—In the paving case, the Committee determined that the paving tax was due without demand; the tax on being assessed was considered to be immediately due. Here the vitality of the rate depends upon the warrant; and the question is, was the warrant issued in time to affect the right of the voter to poll? It is admitted, that if the voter polled upon the 14th, his vote would have been good. In law a term is treated as one day, and the Committee ought, also, to treat an election as the act of one day. After the election commenced, no proceeding that does not equally affect all voters ought to be permitted to be done.

 It is said, that the voter could not conscientiously swear, that more than one half-year's amount of the tax was not due. Surely it is clear, that on the 15th the tax was not due and payable; and how could he possibly tell, that by his delay to vote until the next morning, the tax would be due and collectable under a warrant which he might have felt assured was not in

existence. The warrant was made too late. The witness is asked when he received it; he says the 16th or 17th; it was signed on the 15th, and the vote was given on the 16th. As a rule of law, if two acts are done upon the same day, that is considered to be done first which shall prevent any consequence prejudicial to the parties interested in them. The inference ought to be, that the vote was given before the warrant was delivered. 1836.

It was resolved — “ That it is the opinion of the Committee, that as Terence M’Guire voted upon the 16th of January, at which time it has not been proved that the warrant, which is indispensable for the collection of the grand jury cess, had been received by the collector, the vote of Terence M’Guire must be allowed.”

The vote of Thomas Walsh was allowed under similar circumstances.

COUNTY GRAND JURY CESS CASES.

Mr. *Austin* cited the 26 Geo. III. c. 14 (Irish Act,) sect. 39, 40, 41, 45, 46. The Easter arrears of 1834 are not recoverable, and as only one half-year’s amount of this cess can remain due at any one time, the objections, under this class of cases, fail.

Mr. *Wrangham* stated that the objection came upon him by surprise, and requested that any decision upon it should be deferred until he had had time to consider it.

The request of Mr. *Wrangham* was acceded to; and at the next meeting of the Committee, these cases were abandoned without argument. The warrants of the collectors expire at the end of each half year; and after their expiration, no arrears are recoverable under new warrants.

1836.

WIDE-STREET CESS CASES.

April 11. This class of cases was objected to upon the ground that the Wide-street cess was improperly stated by the petitioners to be a municipal tax; it being affirmed to be a grand jury cess, and that, therefore, the objection to any voter founded upon its being a municipal tax could not be entertained by the Committee. A similar argument against this cess being a municipal tax, was urged, as in the Pipe-water cases, with this addition, that the Corporation of the city of Dublin were not connected with either the levying or the application of it. The cess is expended by the Commissioners for the improvements of the streets of Dublin, and is from time to time assessed and raised under the authority of the grand jury of the county of the city, and the grand jury of the county of Dublin.

The Wide-street cess, in Dublin, a municipal tax.

It was resolved — “ That it is the opinion of the Committee, that the Wide-street tax, is a municipal tax, within the meaning of the 5th section of the Irish Reform Act.”

WILLIAM HENRY CURLEY'S CASE.

In this case it was objected, that it had only been proved that the voter was in arrear of the Easter rate, 1834, and that there was no evidence of a Michaelmas rate, or of the issue of a warrant to any collector to collect a Michaelmas rate. It had not, therefore, been shown that the voter was in arrear of this tax for more than one half-year.(1)

(1) 47 Geo. III. sess. 2, c. 74, sect. 10. And whenever the said Commissioners shall have caused any ground, or any house or houses, or any premises, to be valued by a jury in manner by the said recited Acts, or one of

Mr. Thesiger.—What does the Act require? When 1836.
the presentment is made by the grand juries the duty
of the treasurer commences, which is, to applot
the presentment by half-yearly rates upon the houses

them directed, an authentic copy of the inquisition and finding, signed by three or more of the said commissioners, shall on the first sitting day of any *Easter or Michaelmas Term*, be laid before the Court of King's Bench by the said Commissioners; and the said Court of King's Bench shall, in each and every such case, charge the grand jury of the county of the city of Dublin, and the grand jury of the county of Dublin, to meet in one room, at a certain time, to be named by the court, and it shall then be lawful for the said grand juries so assembled, or any twenty-four or more of them, and they are hereby required, *to present the whole amount of such findings so laid before them; and the sum or sums of money so presented by such grand juries shall be raised, levied, and collected, by two equal instalments,—one instalment in every Easter Term, and the other instalment in every Michaelmas Term, on all and every the houses and other buildings, erected or to be erected, within the district of the metropolis, and all such instalments shall be paid by all and every the owners or occupiers of such houses and buildings respectively.*" This section then declares, that the valuation upon which the rate is to be made, shall be that on which the rate for the maintenance of the watch establishment is made, and that it shall not exceed one shilling in the pound in any one year.

Sect. 11. That from and after any and every such presentments, the treasurers of the grand juries of the county of the city of Dublin, and the county of Dublin respectively, shall, after any *Easter and Michaelmas Term*, assess, without further presentments or direction of any subsequent grand jury, the said half-yearly rate or rates, so presented as aforesaid, upon the respective owners and occupiers aforesaid, and deliver the same in warrants to the collectors hereinafter mentioned, and so, from time to time, until the whole amount of the general presentment shall have been raised, from which time the same respective rates shall cease and be no longer payable.

Sect. 12. And to the end that the said half-yearly rates may be the more easily assessed upon the said houses and buildings, and their respective owners and occupiers, be it further enacted, That it shall be lawful for the said grand juries of the city of Dublin, and the county of Dublin respectively, and the term wherein any such half-yearly rate or rates shall have been presented, by requisition in writing, to be signed by their respective treasurers, to require the proper officer to furnish to the said respective treasurers of the grand juries, within twenty days next after the end of such term, true and correct lists of all houses and other buildings within the district of the metropolis, which are, or may hereafter be liable to be rated towards the maintenance of the watch establishment of the said city; and also true and correct returns of the respective valuations, according to which such houses or other buildings now are, or hereafter

1836. in Dublin. Will the Committee assume, that the treasurer has not done his duty, or that he has been guilty of a dereliction of duty? In the paving cases, the Committee determined that the liability arose upon the assessment made by the Commissioners. Here the moment the presentment is made, the liability for the entire yearly amount of the rate attaches. It is to be levied in half-yearly instalments. The treasurer is to applot the assessment, and on his warrants the tax is to be collected. Each person who is rated for Easter Term, knows what his Michaelmas rate will be; there is one instalment due at Easter and another at Michaelmas; whoever is rated at Easter, must be rated at Michaelmas. The assessment is not to exceed one shilling in the pound, and the sum at which the party is to be assessed is certain, and defined by the Act of Parliament. It was the duty of the treasurer to make the rate at Easter; and it will be a hardship upon the petitioners, if the Committee shall not consider the proof given of the voter being in arrear sufficient.

Mr. Austin.—The question simply is, has any evidence been given to show that Curley owed more than one half-year's amount of this tax.

1. The Easter rate is not shown to have been made, or to be due and payable.

2. It is not shown that the sum to be raised by the assessment has not been exhausted by the Easter rate. (1)

shall be rated, towards the maintenance of the said establishment; and also yearly and every year afterwards during the continuance of any such half-yearly rate, by like requisition to be made two calendar months *before the sitting day of Easter Term*, to require the said officer to furnish to the said respective treasurers within twenty-one days before the sitting day of the said Easter Term;" lists and copies of the valuations before mentioned.

(1) In a subsequent case it appeared that the whole sum presented by the grand juries had not been raised by the Easter rate of 1834.

3. The rate was only due by virtue of the assessment made by the treasurer, and was only payable under warrants issued by him to the collectors and there is no evidence to show that any warrant for the collection of the Easter rate was issued. 1836.

It ought to be shown that the rate exists, before it can be said to be payable. Would any court of law endure that a party should be charged with a tax, without showing the authority under which it is imposed? It is specially required by the Act, that the rate should be made out in a particular manner, and until it is proved to have been so made out, no warrant can be issued. Half-yearly rates are to be collected, but if the rate was not made it was not collectable. After the rate is made, warrants are to be issued: but suppose that the warrants were not issued, or were not issued in time? In the grand jury cases it was shown, that an assessment upon a voter was not payable, as the warrant was not in the hands of the collector until the day of polling. So here, unless the rate was made and the warrant delivered, there was no person who could receive the rate, or to whom it was payable. The grand juries make a presentment upon the finding of certain petty juries. The treasurer makes the rate, and the collector receives the rate. How can it be possible to say that the rate is due until the ordinary evidence to prove a rate is produced? You are called upon to presume the existence of a rate and the delivery of the warrant. If there was a rate and warrant, why were they not produced? If it is sufficient to presume that the officers have done their duty, why was evidence of the existence of a rate given in any case?

Mr. Maxwell.—There is a receipt before me for Easter and for Michaelmas Term.

Mr. Austin.—The evidence of a rate is the rate,

1836. of a warrant, the warrant. The receipt before the Committee does not relate to this voter, nor is there evidence of the time at which it was made. A receipt given by the collector cannot supersede the necessity of producing either the rate or the warrant. When produced, they may be invalid, the rate may upon the face of it be bad, the warrant may be without signature. A receipt proves the payment of a sum of money upon the representation of the collector, it does not prove his authority. Many things may be presumed to have induced the party to have made the payment, though not liable to it; but no presumption was ever suggested to be carried so far as to disfranchise a voter without evidence of his liability to pay the tax, for the non-payment of which he is objected to.

In the cases relating to the watch rate, the Committee determined that the sanction of the divisional magistrates was requisite. Can they therefore, with that resolution before them, presume that this rate was necessarily made according to the directions of the law?

It was resolved—"That it is the opinion of the Committee, that no proof has been adduced that a rate was made for Michaelmas Term 1834, but that William Henry Curley, having two days after he voted paid the arrears of Wide-street cess, for Michaelmas 1833, and for Easter 1834, was in arrear at the time of voting, more than six months' amount of a Municipal tax, and must therefore be struck off the poll."

Upon this resolution being communicated by the Committee, counsel were asked if the block receipts before the Committee were in evidence. Mr. *Harrison* replied, that they were; and it was then stated, that in the receipts it would be found that the arrears due by this voter at Easter and Michaelmas 1834, were paid after the election. Mr. *Austin* said, that he should have

been obliged to the Committee, before they came to their resolution, to have informed him of the discovery they had made, for he thought he could have induced them to have drawn a different inference from the block receipts. 1836.

Mr. Harrison then asked permission to have the rest of this class of cases adjourned, in order to afford time to look through the block receipts, as he was not aware of the entries which the Committee had discovered.

Mr. Young.—The decision of the Committee has only had the effect of placing the petitioners in a situation more favourable than they conceived themselves to be, and does not entitle them to the indulgence of time. They are in the position of plaintiffs in a cause, and ought to be prepared to go on.

After much opposition to the application, the room was cleared, and the Committee resolved to adjourn.

GARRAT DOYLE'S CASE.

This voter was polled upon January 14, 1835, and paid the arrears of the Wide-street cess, due by him for Easter 1834, upon the evening of the same day. April 13, 1836.
Among the block receipts of the collector was one dated January 13, 1835, given to — M'Carthy for Michaelmas Term 1834, and there were various others for Michaelmas Term, some paid in January and some paid in February. The agents of the petitioners, in cross-examining the collector, asked when he closed his books for Michaelmas 1834, and he replied, "three days before the commencement of Easter Term 1835." There was no other evidence respecting the rate for Michaelmas 1834, or respecting its collection; and the only evidence of non-payment of the rate, distinctly

1836. referring to the voter, related to the non-payment of the Easter rate for 1834.

Mr. *Thesiger*.—Before the general questions are referred to, it may be observed, that Doyle voted on the 14th, and that he paid the tax, after the poll had closed, upon the evening of the same day. There is no reason to regard his case as one of feeling. It was necessary that he should pay the money sooner or later, and his friends were probably not disposed to assist him until they were assured that they had secured his vote. There is no evidence of a tender of the rate previous to the moment of polling; the collectors do not appear to have been out of the way, and the voter was clearly in arrear, and disqualified.

It is established, by the evidence given, that there was an assessment in 1834, and that the collector made up his books for Michaelmas 1834, three days before Easter 1835. Suppose that this evidence had been given in chief upon the examination of the collectors, it would no doubt have been objected that this was not the best evidence: but the material fact came out upon cross-examination; and evidence that would be bad, if originally tendered, may be sufficient if it is given in cross-examination. *Blewitt v. Tregonning*. (1) If the evidence had been confined to the examination in chief, there would have been no proof of any assessment, but the cross-examination supplied it. It was asked, "When did you close the Wide-street cess?" and this question clearly shows that the assessment was admitted.

It will be inquired, ~~why~~ is it that the rate books are not produced? The parties never thought that there was any necessity to prove the Michaelmas rate as they did the Easter rate; they therefore did not give the evi-

(1) 5 Nev. and M. 308.

dence for the Michaelmas in the same formal way as 1836.
they gave it for the Easter Term. Upon the cross-
examination, sufficient was proved to satisfy any honour-
able mind, that more than one half-year's amount of the
cess was due.

Was it necessary formally to prove that the Michaelmas rate was in arrear, the arrears for Easter having been proved? Whoever is charged at Easter is charged at Michaelmas. The rates for Easter and for Michaelmas are of the same amount, and are payable by the same parties. The assessment is made at the beginning of the year; and the fact of the collection in January 1835, is conclusive evidence that all the previous machinery was properly set in motion. It is impossible to explain the receipts that have been produced, if the assessment was not in existence. But we are not driven to the mere facts of this case. Upon the principles of law recognizable in all courts, it is presumed that an act required to be done by a public officer, is properly done until the contrary is shown. *Powell v. Milbank*; (1) *Williams v. East India Company*; (2) *Lord Halifax's case*. (3) If the treasurer had wilfully neglected to issue the warrants, he would have been guilty of a misdemeanour, and would have been liable to an indictment. The presumption of law is, that he did what was regular; and it must be shown, by those who impeach his conduct, that he either neglected or erroneously performed his duty. No presumption of error or of neglect can be permitted, and if either are charged, it must be proved.

Mr. Austin regretted that he should be expected to argue this question. In addition to any other complaint that he might make, it was an attempt to get rid

(1) 2 Black. R. 851. See 1 *Phill. on Evidence*, 195, 7th edition.

(2) 3 *East*, 193.

(3) *Buller's N. P.* 298.

1836. of the last resolution, and to re-argue a question that had been decided. The resolution was, that no assessment or warrant for Michaelmas 1834 had been produced, and that there was no evidence that the Michaelmas rate had been in the course of collection. The material consideration therefore is, whether, in this case, there is any evidence of a rate or warrant. What is the evidence that is given? A block receipt is produced of a payment of the rate by the voter? No, by by one M'Carthy, not by the voter; and the collector is asked, "When did you close the Wide-street account for Michaelmas last?" He replies, "three days before the commencement of Easter Term." From these premises a rate and a warrant are to be inferred, legally executed and perfect in every circumstance necessary to give to them validity.

With respect to the block receipt-book, what is the value of its entries? They are so erroneous as to be utterly without value, and are most dangerous to rely upon. These are entries that it contains:—"Received from Thomas Dodd, for Easter Term 1835," &c.; the book, be it remembered, relating to Michaelmas Term 1834, and being closed three days before Easter Term 1835. Another payment is mentioned by one O'Reilly, for Michaelmas Term 1833; next to that is an entry of a payment for Easter Term 1833; the next has no year inserted in the receipt; the next is for Michaelmas 1833; and similar entries are to be found throughout the book. Such is the accuracy of this block receipt-book, which affords the evidence upon which voters are to be struck off the poll.

The effect of the cross-examination has been strongly stated to the Committee. The reply of a witness on cross-examination can only be treated as the admission of the fact stated, namely, the closing of his account.

He does not tell the contents of the rate, or of the warrant. But what is the course pursued in the highest to the lowest court in the country, in the case of a license of alehouse, the patent of a Peer of Parliament, or the conveyance of an estate? You must produce the original document you refer to, or account for its loss, or your inability to produce it. It is a proposition that admits of no limitation. If it is proposed to use a written instrument, the presumption if it is not produced is, that it contains something prejudicial to him who ought to produce it. If you wish to use a record, you must produce it. Here we have none of the proof necessary to establish either the existence of a rate or of a warrant. The witness was asked, "when did you close your account?" Giving these words their greatest latitude, what do they show? Merely the closing of the account of the collector. Assuming that they show the existence of a rate, and of a warrant, still it is incumbent upon the petitioners to prove that the rate was legally made, that the warrant was legal, and that the warrant was issued before the election. How also can the Committee, or the sitting member, ascertain that the voter was upon the rate, or that his name was in the warrant? The protection of a most clear and undisputed rule of law is claimed in support of this vote. If the name of the voter is in the rate, show it; if in the warrant, show it. The legal inference is, that the rate and warrant are known to be bad, or that the name of the voter is not in them, and that therefore they are not produced. The legal presumption is, that these instruments, being kept back, are bad; and this presumption has been proved to be correct, by the character of the rates that have already been given in evidence. The rule of law insisted on is not an idle device of lawyers; it has been constructed upon an

1836. accurate knowledge of the transactions of men. It is the result of a long and intimate experience, and it has been framed to promote the ends of justice. When the grand jury cess was produced, vote after vote was saved by showing that the liability contended for did not exist in consequence of the defects of the documents produced. Will it be said that the sitting members are to be excluded from the same advantages in this case?

It is true, that where a culpable omission or neglect of duty is charged, that the person who makes the charge is bound to prove it: but here no charge is made of culpable omission or neglect of duty. The rate may be made, but nevertheless may be bad. The treasurer may have endeavoured to make a good rate and failed, yet no indictment could be sustained against him. If the rate was *bonâ fide* made, and erroneous throughout, the treasurer could not be prosecuted. Why indeed is evidence of any rate ever required, if the principle contended for is correct? A *bonâ fide* mistake is a good ground for appeal; but no presumption in favour of the overseer prevents the production of the rate. Were it otherwise, no rate, however erroneous, could possibly be questioned, and the most monstrous injustice would be committed.

What then are the presumptions that the Committee is to make?

1. That a rate was duly made.
2. That a warrant was issued, duly signed and sealed.
3. That the name of the voter is in a rate, of the existence of which there is no evidence.
4. That the name of the voter is inserted in a warrant, of the existence of which there is no evidence.

The petitioners are bound to make out their case by proper evidence. The Committee is not entitled to guess, or to be guided by mere surmise. They will violate the plainest rules of law if they are satisfied to proceed without the evidence which we call for, and which we insist ought to have been produced. The non-existence of the documents has not been attempted to be proved; nor has any case been made for the admission of any secondary evidence. 1836.

If any presumption arises, on the ground that a neglect in levying the rate would expose the treasurer to any penalty, it ought, also, in the absence of evidence that we are entitled to require, to be a ground of presumption that the voter was qualified when he polled. The 59th section of the Irish Reform Act enacts, that if any disqualified person, or person ceasing to be qualified, shall vote, he shall forfeit 100*l.*, and be subject to the penalties in force for such offence; and that in case of a petition, his vote shall be struck off by the Committee, with such costs as to them shall seem meet, to be paid by him to the petitioner. If then a presumption arises, from the penalties attached to the performance or the neglect of certain acts, it should be in favour of the franchise, and not in favour of its limitation or destruction.

It was resolved—"That although the treasurer's warrant for the Wide-street tax for Michaelmas 1834, has not been produced, yet considering the legal presumption raised by the obligations of the Act, and connecting therewith the direct testimony of Johnston the collector, and the corroboration afforded by the block receipts, it is the opinion of the Committee, that the fact of such a rate [for Michaelmas 1834, *Ed.*] having been made is sufficiently proved. April 4.

1836. "That as, by the 12th section of the 47 Geo. III. c. 74, the list of houses liable to be rated, must be made by the proper officer within twenty-one days before the sitting day of Easter Term, and be transmitted to the treasurer; and as it does not appear that any authority exists for any alteration therein, until the succeeding Easter; all houses included in it, on which the first instalment of the rate was charged, must have continued chargeable with the second, on Michaelmas instalment for the same year, and that the house No. 111, New-street, being included in the Easter applotment, was, therefore, together with the owner and occupier thereof, so chargeable.

"That Garrat Doyle, registered for the house No. 111, New-street, and voted on that qualification on the 14th of January 1835, thereby admitting himself to be the occupier; that at the time of voting, the Wide-street tax for Easter Term and that for Michaelmas Term, chargeable on No. 111, New-street, remained unpaid; and that Garrat Doyle, being therefore in arrears more than six months' amount of a municipal tax, his vote cannot be allowed." (1)

(1) The following resolutions were proposed and negatived:—

1. By Mr. Vivian.—"That no assessment or warrant for Michaelmas 1834 having been produced, and no evidence adduced of any such rate having been in the course of collection previous to the period of the election, this Committee cannot admit that the non-payment of the Wide-street cess be made the ground of the disqualification of a voter."

2. By Mr. Rundle.—"That no proof has been adduced that the warrants necessary to authorise and empower the collectors to levy and collect the Wide-street tax for Michaelmas Term 1834, were in the hands of the collectors before the election, and consequently there is no sufficient proof to justify the disfranchisement of Garrat Doyle for the non-payment of the said municipal tax."

1836.

THOMAS BRYANT'S CASE.

Mr. *Austin* objected that the rate was not shown to be due by this voter for Michaelmas 1834, when he was interrupted; and after considerable discussion, it was resolved :—

“That if an application be regularly made for a reconsideration of their resolution of yesterday, on strong specific grounds, the Committee will give to such application their most attentive consideration : but in the investigation of any particular vote, they cannot permit either evidence or argument for the purpose of impeaching the correctness of the affirmative contained in their Resolution, “that the fact of the rate having been made for 1834 has been sufficiently proved.”

Committee.—We presume, in the absence of evidence to the contrary, that a public functionary has conformed to the law. If Mr. Austin is prepared to say that this presumption does not exist in this case, because he can prove that the treasurer did not conform to the law, that will be a specific ground for this application.

Mr. Austin was heard, and Mr. Thesiger replied ; when it was resolved—“That it is the opinion of the Committee, that no specific grounds have been alleged sufficient to justify the Committee in reconsidering their resolution of the 14th instant.”

Mr. *Austin* then stated, that the Wide-street cess for Easter 1834 was no longer collectable, and that, therefore, assuming the Michaelmas rate to be in arrear, there was not due and payable by the voter, more than one half-year's amount of the tax. The 47 Geo. III. c. 74, s. 22, (1) directs the collectors to

(1) 47 Geo. III. c. 74, (L. and P. A.), sect. 22. That the said several and respective collectors shall, seven days before the sitting day of every Easter

April 15.
On the
statement
of strong
specific
grounds, a
re-hearing
will be per-
mitted.

1836. return the arrears of each half-year, and the grand juries are to act with respect to such arrears, in like manner as with respect to any other arrears of public money. It is impossible to construe this Act without referring to the Grand Jury Act. The collectors "respectively" are to have the powers given under the Grand Jury Act, and the grand juries are to proceed with respect to the arrears, as under the Acts referred to in the grand jury cases. The 26 Geo. III. c. 14, s. 39, requires the collector to close his account four days before the essoign day of each Easter and Michaelmas Term; and he is at the same time to deliver to the treasurer his warrant. After his warrant is delivered, he is forbidden to collect any sum of money mentioned in them. Looking at the 22nd section, and referring to the former Acts, the collector has only a power to collect up to a certain day, and then his warrant expires. The arrears are then only collectable in the mode directed under the former Acts. If the warrants continued in force after the return of the arrears, the collector might proceed to collect after such arrears had been re-applotted, and great mischief, fraud, and inconvenience might follow.

Mr. *Thesiger*.--The payment of arrears can be en-

and Michaelmas Term, return to the treasurer of the grand juries of the said county of the city and county of Dublin respectively, true and faithful lists, to be verified by the respective affidavits of such collectors, of such persons by whom any rates or assessments aforesaid, or any part thereof, shall at the time of making such affidavits, respectively remain due and unpaid, and who shall have become insolvent, and of the amount of the sum or sums of money due by such persons respectively, specifying such rates and assessments as remain due and payable out of the houses and premises lying within such city of Dublin, and such as remain due and payable out of such parts of the county of Dublin as lie within the district of the metropolis; and the said treasurers shall lay the same before the grand juries, and that the said respective grand juries shall have the power to act with respect to such arrears in like manner, to all intents and purposes, as with respect to arrears due of any other money by them presented.

forced without any re-applotment. There is no direction in the 47 Geo. III. to return the warrants, and they continue in the hands of the collectors until the amounts mentioned in them are collected. There is no penalty attached to the non-return of the warrant at any particular time. 1836.

It was resolved—"That the collectors of the Wide-street tax are not required by law, " four days before the essoign day of each Easter and Michaelmas Term, to deliver to the treasurer, the warrants empowering them to collect that tax, and that the arrears of Easter Term 1834 were, at the period of the election in January 1834, collectable under the original treasurer's warrants in which they were included." April 16.

The Committee also stated, that they had determined the following points:—

1. That the Wide-street tax was assessed for Michaelmas 1834, and that the same became due and payable before the election.

2. That the rate is a charge upon the premises.

3. That the occupier of the premises is liable for the non-payment of the rate made thereon.

And that in the case of the disqualification of a voter, proof will be required:—

1. That the rate for Easter upon certain premises was unpaid at the time of the election.

2. That the voter registered and voted in respect of the premises on which the arrears are proved to be due.

On April 22, it was resolved—"That the counsel for the sitting member are precluded from impugning the Michaelmas rate, on any supposition of the time having expired within which the Wide-street tax could be collected according to the 11th section, or on any impeachment of the lists required for the Easter

1836. assessment by the 12th section; but it is competent to them to prove, that the treasurer did not assess and levy the tax for Michaelmas, as required by the 13th section, and in default of such proof, the Committee will consider on the evidence adduced in the case of the barony of Coolock, as they did in those of St. Sepulchre and Donore, how far the legal presumption of the rate having been assessed, is corroborated by other circumstances."

WILLIAM LYNCH'S CASE.

April 23.
Where
there was
evidence
of the
mere exist-
ence of a
rate, the
rate was
presumed
to have
been legally
made.

Before Mr. Austin commenced his argument in this case, the Committee retired, and on their return stated—"The counsel for the sitting member having declared, that he has no evidence to offer in proof of the non-assessment of the Michaelmas rate by the treasurer, the Committee desire to be informed what legal points are proposed to be raised for the purpose of invalidating the rate in the barony of Coolock, which has been already confirmed with respect to St. Sepulchre and Donore."

Mr. Austin.—The Committee in former cases could not have meant to decide, that the mere direction of an Act of Parliament to make a rate is sufficient to enable them to infer that a rate has been made without any corroborative evidence. There are no books of collectors relating to this barony produced, to show any collection of a Michaelmas rate. There is no rate produced, no warrant and no receipts. The arrears due at Easter 1834 are alone proved. The Committee is bound by the rules of law: unless they adhere to them, there can be no protection to any party, and no defence, however strong or just, will avail. The pre-

sumption in former cases depended upon corroborative evidence which does not exist in this case. 1836.

Mr. Thesiger.—The decisions of the Committee upon the presumptions that are to be made respecting the conduct of public officers are not to be questioned. This is merely an attempt to get rid of the resolutions that have been passed. [*Mr. Vesey.*—The warrants could not have been sent over to England without great public inconvenience.] Certainly not.

It was resolved—"That the legal presumption of the Michaelmas rate having been assessed for the barony of Coolock, is sufficiently supported by corroborative evidence, and the premises No. 3, Eccles-lane, having been proved, (1) to have been in arrear for Easter and Michaelmas Term 1834, at the time of the election, the vote of William Lynch the occupier cannot be allowed."

MICHAEL BRYAN'S CASE.

The voter who was in arrear for the amount of the grand jury cess, and the Wide-street cess, for an entire year previous to voting, paid to the collector of the grand jury cess, who was also collector of the Wide-street cess, twenty shillings in payment of his arrears, but he did not specifically direct it to be applied to the extinction of part of the arrears of both taxes. The collector applied the payment to the extinction of the arrears of the grand jury cess, for Easter and Michaelmas 1834.

A voter who was in arrear, for Easter and Michaelmas 1834, of two taxes, which were collected by one collector, paid a sum sufficient to cover the Easter arrears of both taxes, but the collector applied the payment to the extinction of the whole arrears of one tax; held,

It was resolved—"That the twenty shillings paid by Michael Bryan, previous to voting, to the collector

(1) The Michaelmas rate was merely presumed to be in arrear. There was no proof of the rate, and this indeed is admitted at the commencement of the resolution. What the Committee considered to be corroborative evidence in this case, the reporter was unable to ascertain.

1836. of the grand jury cess, and of the Wide-street cess was sufficient to discharge the Easter grand jury cess and the Easter instalments of the Wide-street cess and that the Committee therefore cannot consider him to have been in arrear more than six months' municipal taxes, at the time of the election, and that his vote must therefore be allowed."

that the payment should be considered to have been made in respect of the Easter arrears of both taxes.

MISCELLANEOUS CASES.

MICHAEL B. LACY'S CASE.

April 21. This voter was objected to under the 43 Geo. III. c. 25, (1) which enacts, that no "commissioner, officer or other person," shall be capable of voting at an election for the choice of representatives in Parliament in Ireland, who is concerned or employed in collecting receiving, or managing any of the duties on stamped vellum, parchment, and paper in Ireland. He was a licensed dealer for the sale of stamps.

A licensed dealer in stamps held not to be disqualified to vote.

It was resolved—"That it is the opinion of the Committee that Michael B. Lacy, licensed dealer in stamps, does not fall within the provisions of the Act 43 Geo. III. c. 25, by which persons concerned or employed in collecting, receiving, or managing any of the duties on stamped vellum, parchment, and paper, in Ireland, are disqualified from voting." (?)

JOHN ARMSTRONG'S CASE.

This voter, who was a letter-carrier, was objected to under the 43 Geo. III. c. 25, which renders incapable of voting at elections "any postmaster, or postmaster general, or his or their deputy or deputies, or any person employed by or under him or them in receiving

A letter-carrier held to be disqualified to vote under the 43 Geo. III. c. 25.

(1) Hudson on Elections, p. 203.

(2) K. & O. 436.

collecting, or managing the revenue of the post-office in Ireland, or any part thereof." 1836.

It was said, that no objection had been taken to this class of voters for at least fifty years, and that they were nothing but servants hired at wages of so small an amount as not to render their employment in the post-office of greater certainty, or value, than any other employment. It was admitted that the voter filled a very humble station, but it was contended that he was clearly within the words of the Act. (1)

It was resolved—"That as John Armstrong is proved to have been 'employed under the post-master-general in receiving and collecting the revenue of the post-office in Ireland,' he is expressly disqualified from voting by the 43 Geo. III. c. 25, s. 1, and his name must therefore be struck off the poll."

It was then stated that the voter had not been identified as the voter objected to; when it was resolved—"That the evidence now before the Committee is not sufficient to identify John Armstrong, the letter-carrier, whom they have directed to be struck off the poll, with John Armstrong, of No. 7, Wormwood-gate, described in the register as a furrier; but as it is alleged that the identity would have been proved if a list, laid before the Commissioners, had been returned by them, the Committee will, if required by the agents for the sitting member, give directions to the Commissioners to send over immediately any document in their possession necessary to the elucidation of the facts of the case."

(1) See cases collected in Chambers's Dictionary of the Law of Election, titles, "Post-office" and "Police Officers."

1836.

JOSEPH ASHLEY NEWELL'S CASE.

An attorney who acted as an inspector at a booth, and previous to his being employed declared his expectation of being paid, disqualified. The voter was an attorney, and acted as an inspector at a booth during the election. A declaration had been made by him that he expected to be paid, and that he would not act unless it was agreed that he should be paid for his services; 7 and 8 Geo. IV. c. 37, s. 1, and 1 and 2 Geo. IV. c. 58. *Rochester case*; (1) *New Windsor case*. (2) It was objected, that the mere declaration of the voter was insufficient to disqualify him, unless it was shown that he was retained or paid, or that a distinct promise to pay him was made.

April 27. It was resolved—"That it is the opinion of the Committee that Joseph Ashley Newell should be struck off the poll." (3)

PEACE POWER'S CASE.

The vote of a party who was proved to have merely acted as the inspector at a booth, retained on the poll. This voter acted as an inspector at a booth, and he was objected to upon the same grounds as are mentioned in the last case, but there was no other evidence given than that of his having acted as an inspector.

It was resolved—"That as in this case, no evidence has been adduced, leading the Committee to the conclusion that Peace Power, who acted as an inspector at the late Dublin election, received any payment or promise of payment for such employment, his vote must be allowed."

(1) K. & O. 97.

(2) K. & O. 173, 174; and see K. & O. 182, 183, 185, 42..

(3) It was proposed and negatived—"That the Committee is of opinion, that the fact of Joseph Ashley Newell, an attorney, having acted as an inspector in a polling booth at the Dublin election, connected with the whole tenour of the evidence taken before the Commissioners, is sufficient to bring this case within the 5th section of the 7 and 8 Geo. IV. c. 37, and that the vote must therefore be struck off the poll."

1836.

EDWARD STANLEY'S CASE.

This voter acted as a deputy of the sheriff during the election, and was paid for his services. It was contended that he was a public officer, not acting in favour of either party, *New Windsor case*, (1) and that he was entitled to vote.

The vote of the deputy of the sheriff held to be good, though he was paid for his services.

The vote was allowed. (2)

JAMES STANLEY'S CASE.

This voter acted as deputy clerk of the peace; he was appointed specially for the purpose of performing certain duties at the election, and was paid for his services. 60 Geo. III. and 1 Geo. IV. c. 11, s. 8; 2 Geo. IV. c. 58, s. 3; 7 and 8 Geo. IV. c. 37.

The vote of the deputy clerk of the peace, who was paid for his services at the election, held to be good.

It was resolved—"That it is the opinion of the Committee, the present case comes within the meaning of the last decision (*E. Stanley's case*), and that the vote should be allowed."

POLICE CASES.

WILLIAM SHEILD was objected to under the 48 Geo. III. c. 140, being a patrol-constable. There was some doubt if his appointment was not under the 5 Geo. IV. c. 28. It was resolved—"That it appears

A voter holding the place of patrol-constable under the police establishment of Dublin, held not to be entitled to vote.

(1) It was moved by Mr. Young and negatived—"That it appears to this Committee, that as Edward Stanley acted as poll-clerk, and was paid for his services, and as by the 7 & 8 Geo. IV. c. 37, it is expressly provided that if any person shall be employed at an election, and shall take from any person whatsoever, in consideration of such employment, any sum of money, such person shall be deemed incapable of voting, the vote of Edward Stanley cannot be allowed." Another resolution was then proposed and negatived, reciting the provisions of the Act as in this resolution, and declaring Edward Stanley not to be within them. A resolution simply allowing the vote was then passed. The Commissioners put the evidence respecting the case upon the rejected sheet, being of opinion that the case was not within the Agency Act. See *Notcutt's case, Ipswich*, *infra*, 287.

(2) K. & O. 180, 183.

1836. by the evidence, that William Sheild voted in the election of the city of Dublin, being at the time a patrol-constable of the Dublin police establishment, and that either by the Act of the 48th Geo. III. or the 5th Geo. IV. he was disqualified. (1)

The pay-clerk of the police establishment held not to be entitled to vote.

JAMES WHITESIDE was a pay-clerk in the police establishment; and it was resolved—"That as it appears by the evidence, that James Whiteside held the situation of pay-clerk in the police establishment at the time of the election, his vote cannot be allowed."

The secretary of the magistrates of the police office held to be entitled to vote.

AUGUSTUS FREDERICK PEMBERTON was objected to as the secretary of the magistrates at the police office. His salary was paid by the receiver of the police establishment. It was resolved—"That it appears to the Committee, that no sufficient evidence has been adduced to show that the situation held by Augustus Frederick Pemberton was an appointment under the 48 Geo. III. c. 140, and his vote must therefore be allowed." (2)

A watchman under the police establishment is not entitled to vote.

BERNARD CALLAGHAN was objected to upon account of being a watchman under the police establishment. It was objected that it ought to have been shown distinctly, that the appointment of the voter was made under the 48 Geo. III. c. 140; he might have

(1) 48 Geo. III. c. 140, s. 15, "That no barrister, or other officer or person, nominated or appointed under this Act, except the said divisional justices who shall be aldermen, sheriffs, peers, or common councilmen, shall during the time he shall continue in office, or within six months after he shall have quitted the same, be capable of giving his vote for the election of a member to serve in Parliament for the county of Dublin, or the city of Dublin respectively."

(2) It was moved and negatived—"That the Committee cannot perceive in the evidence in the case of A. F. Pemberton, a sufficient distinction from that of J. Whiteside, to induce them to make a different decision, and that he vote must therefore be disallowed."

been appointed under the 5 Geo. IV. c. 28. It was resolved—"That the Committee, being satisfied that Bernard Callaghan held, at the time of the election, the situation of watchman under the police establishment, are of opinion that his vote cannot be allowed." 1836.

CASES OF MISNOMER.

BERKSFORD COLLINS.—This voter was objected to as Ramesford Collins, and the Commissioners, upon account of the misnomer, refused to take any evidence respecting the case. It was resolved—"That no evidence having been taken in this case before the Commissioners, the Committee cannot enter upon its consideration." (1)

WILLIAM LAWLOR.—Objected to as William Lowler. It was resolved—"That the discrepancy was not of such a description as to prevent the vote being gone into."

JOHN FURLEY.—Objected to as *James* Furley. It was resolved—"That the Committee are of opinion that the variance is fatal."

JAMES EGAN.—Objected to as James Ewgn. The number referred to, in the exchanged list, upon the poll, was correct, and in the poll-book the name was correctly written. It was resolved—"That it is the opinion of the Committee, that the name contained in the list delivered to the petitioners being Ewgn, it is not under the limitation expressed in the 3rd section of the 42 Geo. III. c. 106, competent to the Committee to enter into the consideration of the case as that of James Egan."

(1) See Chambers's Dictionary, title "Misnomer."

1836.

CASES OF BRIBERY.

In consequence of the Committee having, in their instructions to the Commissioners, directed that no recriminatory evidence should be admitted against the unsuccessful candidates, except so far as regarded the disqualification of voters, the agents of the sitting members in Dublin were precluded from giving any evidence of systematic bribery. It was contended, upon the cases of bribery being entered upon, that the Committee were bound to have directed a full investigation of all the facts and charges mentioned in the petition, and connected with the return, and that the restriction imposed upon the Commissioners was improper. No new warrant under the 42 Geo. III. c. 108, s. 27, was, however, applied for.

In the case of individual votes to which the evidence before the Commissioners was confined, the following decisions were made :—

To dis-
qualify
voters on
account of
bribery, a
promise of
payment,
or corrupt
expectation
must be
proved.

CASES OF JOHN KEETING AND OTHERS.—It was resolved—“ That it is not proved in evidence, that the vote of John Keeting was given under any promise of payment, direct or implied, and that his name must therefore remain on the poll.”

“ That the votes of Matthew Madden and George Osborn, were given under a corrupt expectation held out by John Knaggs, and that their names be therefore struck off the poll.”

“ That although Patrick Finucane attributes corrupt inducements to Knaggs, Whitty, and Counsellor Oulton, his evidence contains so much prevarication and contradiction, that the Committee can place little reliance on it; but that, as it is sufficiently proved, that he voted

under a corrupt expectation, and afterwards accepted payment, his vote must be struck off the poll." 1836.

EDWARD DALTON was objected to upon account of being bribed "at or after the election." Evidence will be received that will raise the presumption of a corrupt expectation or promise of reward, in cases of bribery.

It was resolved—"That the evidence is insufficient to connect the payment of three pounds to Edward Dalton with any promise or expectation *previous* to voting, which the Committee consider indispensable to the establishment of a charge of bribery, and that his vote must therefore be allowed."

In several other cases decisions were made in similar terms; but in the consideration of a subsequent case (that of Andrew Hutchinson), the Committee remarked, that there seemed to be a misapprehension of their decision, when it was expected, in order to substantiate the offence of bribery, that a promise, direct or implied, should be proved. They were anxious it should be understood, that they did not expect direct proof in order to convict a party of bribery. If it could be proved by evidence, or what they might call an equitable presumption, that the promise of reward was held out to the voter, it would be sufficient to substantiate the allegation. The words adopted in their resolutions, "expectation, direct or implied," (1) were taken from a judgment cited to them. They required that there should be proved some connection with a previous expectation on the part of the voter, and his subsequent receipt of reward. They wished to give the utmost possible latitude, so as to admit any thing to be given in evidence that could convey, on the part of the voter, an expectation of reward; which, when proved, they had always been ready to strike off the vote.

(1) *Lord Huntingtower v. Gardiner*, 1 B. and C. 297.

1836. **Mr. Harrison.**—No man knows who William Tuite is, until it is shown that he is William Tuite on the poll. You cannot go into evidence to show that William Tuite did not pay a tax, until you show how he voted.

Mr. Austin.—This is a question of the greatest possible importance. The Committee is to determine if they will shut the sitting member out of the scrutiny. We ask to know distinctly the question that has been decided. Is the decision, that no name on the poll shall be attacked by evidence, unless it is shown that the poll-book was referred to when the vote was brought under the notice of the Commissioners?

April 4. It was resolved—"That the resolution adopted upon the 17th of March (*ante* p. 136), and confirmed on Saturday April 2, was founded not only on the view taken by the Committee of the express provisions of the Act of Parliament, but on their conviction, that it would have been unjust to have admitted the poll-books as proof of the particulars of qualification and identity in any especial case, while by the non-production of the books, in that case, the opposing party had been precluded from cross-examination before the Commissioners. But in reference to the fact of an elector having actually voted, the Committee, referring to their reply to the 19th question, transmitted as an instruction to the Commissioners, as well as to the lists interchanged between the parties, cannot now permit that fact to be disputed where the Commissioners have received evidence without objection taken before them on the ground of insufficiency of proof of voting."

Mr. Wrangham.—Is it to be taken as admitted, that every person who is objected to, voted?

Mr. Maxwell.—It is important to know for whom he voted, and we have to see that no disqualified person voted.

Mr. Wrangham.—The Committee must be satisfied **1836.**
that the party polled for the petitioners. The fact of
his having voted is not the question. Did he poll for
the petitioners? There may be more than two persons
of this name; and by the non-production of the poll-
books, it is not shown for whom this person voted.
We have been precluded, from no fault of ours, from
disproving the identity of the voter. The other side
refused, in order to pursue vexatious proceedings, to
make a synopsis; it was their duty to have done so, or
to have produced sufficient legal evidence. When in
this case they called the voter, he was not even asked
by them for whom he voted.

Resolved—"That the vote of William Tuite be
struck off the poll."

Mr. Wrangham asked for an explanation of the
decision of the Committee. The Committee has de-
cided that the name shall be struck off, and the doubt
is, whether we are in the minority or majority. The poll-
books not being in evidence, it cannot be said that Tuite
was either in the minority or majority. That Tuite,
by the non-payment of taxes, was disqualified, may
be admitted, but resolution of disqualification can-
not be carried into effect until it is given in evidence
for whom he voted, and that he is on the poll of
either the majority or minority. In all other cases, the
synopsis, or extracts from the poll-books, were produced
to show for whom the parties voted.

It was resolved—"That the resolution of the Com-
mittee to exclude the poll-books, in cases in which
they were not produced before the Commissioners, was
founded on the injustice of admitting them as evidence
of the facts on which the legality of a vote was de-
pendant, while their non-production had prevented
cross-examination. But they have never had any

1836. reason to believe that any question would be raised as to the fact of an elector whose name is contained in the lists interchanged between the parties having actually voted, or for which of the candidates; and considering that the poll-books have, from the commencement of the inquiry, been in evidence before the Committee, they over-rule the objection raised by counsel for the petitioners, and decide that they may, if necessary, be referred to for the purpose of giving effect to their decisions."

April 5.

March 26.
The affidavit of a voter not being produced, the printed list of voters, made out by the clerk of the peace, permitted to be referred to.

JOHN CAVANAGH'S CASE.—There was no affidavit of the registry of the voter produced, and it was proposed to put in the printed list of voters made out by the clerk of the peace.

It was resolved—"That it appears to the Committee, that the printed list of voters [signed by the registering barrister, and transmitted by the Commissioners as an exhibit,] should be received."

Mr. Joy.—The list is not signed by a registering barrister.

Mr. Thesiger.—But it is signed by the clerk of the peace, the person who, under the 35th section of the Irish Reform Act, is to make it out.

The Committee then amended the resolution by striking out the words "signed by the registering barrister," and inserting in their place the words, "made out in conformity with the Reform Act, 2 and 3 W. IV. c. 88." (1)

(1) It was proposed and negatived—"That the printed copy of the register cannot be admitted as conclusive proof of the particulars of the registration of a voter, unless sufficient cause has been shown for the non-production of the original affidavit and certificate."

MICHAEL COLLIN'S CASE.

1836.

In this case no affidavit was produced, and the printed list of voters was offered in evidence. Mr. Austin objected, unless some proof was given of the loss of the affidavit, or its non-production was accounted for. «

March 30.
Register.
The printed
list of voters
made out by
the clerk of
the peace,
is not con-
clusive of
the facts
stated in it.

It was resolved—"That the Committee have decided on the admissibility of the printed copy of the register, but they reserve to themselves the consideration of the weight to be attached to the evidence it may furnish in each particular case; and they expect that, whenever evidence has been given before the Commissioners accounting for the non-production of the original affidavit or certificate, such evidence be distinctly referred to.

"That it appears to the Committee that the printed register, prepared by the clerk of the peace, cannot be admitted as conclusively identifying a voter, or connecting him with particular premises; but evidence having been adduced, proving to the satisfaction of the Committee that Mr. Collins, registered and voted on 22, Wood-street, on which more than six months' arrears of pipe-water rent was due and payable at the time of the election, his vote cannot be allowed."

It was reported to the House, May 16, 1836—

That Daniel O'Connell, Esq. is not duly elected a citizen to serve in this present Parliament for the city of Dublin.

That Edward Southwell Ruthven, Esq. was not duly elected a citizen to serve in the present Parliament for the city of Dublin.

That George Alexander Hamilton, Esq. is duly elected, and ought to have been returned a citizen to serve in this present Parliament for the said city of Dublin.

1836. That John Beatty West, Esq. is duly elected, and ought to have been returned a citizen to serve in this present Parliament for the said city of Dublin.

That the petition of Robert King, John Mallet, and others, does not appear to the said Committee to be frivolous or vexatious.

That the opposition to the said petition does not appear to the said Committee to be frivolous or vexatious.

That the said Committee have also to inform the House, that they have altered the poll taken at such election, by striking off (here followed the names of 370 voters.)

That the Committee feel it to be their duty especially to report to the House, that eight persons, namely, Matthew Madden, George Osborn, Patrick Finucane, Oliver Richards, John Forsyth, Charles Dempsey, James Baldwin, and Andrew Hutchinson, were struck off the poll as having voted under a corrupt expectation, and having subsequently received money; but the Committee are unanimously of opinion, that there is no evidence that Messrs. West and Hamilton, for whom they voted, were either directly or indirectly implicated in such corrupt practices. (1)

Special Report upon the impediments and difficulties connected with the exercise of the franchise in Dublin.

That the Committee further consider it their duty to make known to the House, that they have found a very general irregularity to prevail in the assessment and collection of the municipal taxes in Dublin; and that from the absence of all public notice of their imposition, the uncertainty attending their collection, and the liability to payment, attached, in many instances, to various occupiers of the same premises, the

(1) The Commissioners in Dublin were expressly directed, by the terms of their commission, not to receive any recriminatory evidence that might be offered against the unsuccessful candidates, and all such evidence, when tendered, was consequently rejected.

exercise of the franchise is frequently subject to im- 1836.
pediments and difficulties, which the Committee cannot
believe were contemplated by the Legislature.

Note to page 117.—*Londonderry case*, March 5, 1807.—Mr. Wilberforce informed the House that, on the meeting of the Committee this day, it appeared that the statements respecting the exchange of the objections of voters having been proposed before the passing of the Act which received the Royal Assent on the 19th day of February last, the same must now be altered, to be made conformable to the said Act; for which purpose further instructions must be had from Ireland, and sufficient time given for preparing and transmitting to England amended statements, pursuant to the said Act, which it appeared could not be done before the 7th day of April following. The Committee was permitted to adjourn until the 7th of April.—*Journals*, v. 62, p. 208.

Note to p. 112.—April 12, 1827, *Westmeath Committee*.—Mr. Colborne acquainted the House, that he was directed to apply to the House for leave to adjourn until the 1st day of May next, to afford the several parties time to prepare the several lists and statements which they are required to deliver in, previous to the Committee issuing their warrants for a commission, the petitioners, Ralph Smyth, Esq. and others, having gone through certain parts of their case, and the petitioners, Sir R. Nagle, Bart. and others, having applied to the Committee for a commission to try their case in Ireland, and the Committee having come to a resolution that they would grant the same.—The application was granted.—*Journals*, v. 72, p. 413.

Galway Committee, April 5, 1827.—An adjournment was allowed by the House from Thursday to the following Tuesday, to enable the sitting member to proceed with his case, in consequence of his being refused a general commission to examine witnesses in Ireland.—*Journals*, v. 72, p. 388.

Note to page 152.—See 2 Rogers, pp. 8, 12, on the Law and Practice of Election, 8vo. edition, 1825. *Middlesex case*, 1 Peck. Introd. 21. This case was argued in the House at some length, and the Master of the Rolls (Sir W. Grant) argued for the strict adherence to the words of the Statute 28th Geo. III. c. 52, and said, that in this, as in all other cases of new jurisdictions, every thing was withheld which was not expressly given, and that if there were other cases in which electors might become parties in the room of the sitting member, beside those specified in the Act, it was nugatory to have mentioned them at all.

CASE III.

LONGFORD COUNTY.

The Committee was balloted for on Thursday, the 8th of February, 1838, and consisted of the following Members:

Edward Stillingfleet Cayley, Esq. (Chairman) <i>Yorkshire, N.</i>	
Capt. Alexander Ellice, R. N. <i>Harwich.</i>	Lt.-Col. John Henry Seale, <i>Dartmouth.</i>
Sir J. Colquhoun, Bart. <i>Dumbartonshire.</i>	T. W. C. Master, Esq. <i>Cirencester.</i>
E. B. Farnham, Esq. <i>Leicestershire, N.</i>	Sir Robert Ferguson, Bart. <i>Londonderry.</i>
Thomas Chaplin, Esq. <i>Stamford.</i>	Alexander Speirs, Esq. <i>Richmond.</i>
William Williams, Esq. <i>Coventry.</i>	Henry Marsland, Esq. <i>Stockport.</i>

Petitioners—

Voters in the interest of Anthony Lefroy, Esq. and Charles Fox, Esq.

Sitting Members—Luke White, Esq. and Henry White, Esq.

Counsel for the Petitioners—Mr. Serjt. Spankie and Mr. Gilmore.

Agent—Mr. Courtney.

Counsel for the Sitting Members—

Mr. Thesiger, Q. C., Mr. Austin, and Mr. Close.

Agents—Mr. Baker and Messrs. Dolan and Potter.

At the close of the poll the numbers were, for

Luke White 671

Henry White 667

Lefroy 561

Fox 550

THE petition, which was of unusual length, complained of the improper reception and rejection of votes, and of bribery and intimidation; and prayed that the two Messrs. White might be declared not duly elected, and that the names of Messrs. Lefroy and Fox might be substituted in the return, or that the election might be declared void. 1838.

On the 10th of February, after the reading of the petition, the parties exchanged lists and statements.

The statement of the petitioners :

“ That the candidates were Luke White, Henry White, Anthony Lefroy, and Charles Fox ; and that the election took place as stated in the petition ; and that the petitioners, Barry Fox, S. W. Blackall, and W. S. Ball, are registered electors of the said county of Longford ; and at the said election complained of, claimed a right to vote, and voted thereat.

“ That the election commenced on the 14th day of August, and closed on Friday, the 18th day of August, when the poll was finally closed by the sheriff, who thereupon declared Luke White and Henry White, Esqrs., as members duly elected at the said election, as having a majority of voters : said Luke White by a majority over Anthony Lefroy of 110 ; and Henry White over Charles Fox, 111.

“ That the apparent majority in favour of said Luke White and Henry White, was not a real majority of the electors of the said county, who claimed and were qualified to vote at the said election, but was merely a colourable majority ; and that the same return of the said Luke White and Henry White, was an undue return, and was procured not only by violent terror, threats, and intimidation, but by the grossest bribery, perjury, and treating, by or on behalf of the said Luke White and Henry White, to electors, and to other persons capable of influencing electors of the said county, and of procuring votes for the purpose of securing their return ; and by the other undue, illegal, corrupt, and unconstitutional means stated and set forth in the petition.

“ That the petitioners will give evidence of, and prove before the Committee, the several statements and charges made and set forth in the said petition.

1838. "That the petitioners have, in the lists exchanged herewith, set forth the names of the voters who voted at the said election for the said Luke White and Henry White, to which they object, and intend to impeach before the Committee, and to have the same struck off the poll and register of the said county, as bad and invalid votes.

"Besides insisting upon the particular matters and things herein stated, and in the lists herein referred to, delivered herewith, the petitioners against the return will further insist upon and contend for the several matters and things stated in their petition, or so much thereof as shall be necessary for showing that the sitting members ought not to have been returned to represent the said county of Longford, and that Anthony Lefroy and Charles Fox ought to have been returned to serve in Parliament for the said county."

The following are the headings of the lists of the petitioners:— (1)

Class No. 1, contains the names of eighty-two persons whose votes have been adjudicated upon and had been determined in the last Parliament, by a Committee of the House of Commons, on the trial of the petition of Barry Fox and others, complaining of an undue election and return for the said county of Longford, to be bad votes, and had been struck off the polls taken at the said election by the said Committee, as not having property of the nature and value, and as not having the beneficial interest therein prescribed by the Act 2 and 3 Wm. IV. c. 80, and were reported to the House of Commons as not having a legal right to vote, but who voted nevertheless for the sitting members.

Memorandum opposite the Names. No. on Register. Name

"The objection to each and every of these persons is the objection stated in the title of this list."

Class No. 2, contains the names of fourteen persons whose votes had been determined by a Committee of the House of

(1) Classes 1 and 3 were the only two which were contested, and therefore they are given at length. Of the headings of the other classes, so much only is given as may show the nature of the objection; and the same course has been adopted in giving the headings of the lists of the sitting members.

Commons, on the trial of a former petition, to be bad votes, and had been reported as such to the House of Commons, and whose names had been removed from the register in obedience to the warrant of the Speaker, and who afterwards were admitted to be registered in respect of the same qualification. 1838.

Class No. 3, contains the names of two hundred and fifty persons, who were permitted to vote for the sitting members at said election, but whose names ought to be struck off the poll and register; for that the property in which such persons respectively sought to be registered as voters of said county, and were registered, and by virtue of which they voted at said election, was not of the nature and value prescribed by the Act 2 and 3 Wm. IV. c. 88, inasmuch as the said property was not of the clear yearly value of 10*l.* over and above all rent and charges payable out of the same as required by the said Act; and for that the qualification described by the said several voters in their respective affidavits made by them, was not *bond fide* of the clear yearly value of 10*l.* each, over and above all rent and charges payable out of the same, as required by the said Act of 2 and 3 Wm. IV. c. 88, all of which several persons under this class enumerated were duly objected to, on the grounds aforesaid, at the respective times of their registry.

Class No. 4, contains the names of fourteen persons, registered as freeholders, under leases made by a lessor who had not, at the time of making the same, a freehold estate therein.

Class No. 5. contains the names of ten persons who had taken the benefit of the Acts of Parliament in force for the Relief of Insolvent Debtors in Ireland, since the time of their said registration, and before voting.

Class No. 6, contains the names of thirty-five persons who did register and vote in respect of lands held by them, under leases made by lessors, who were only tenants for life, and died before the said election.

Class No. 7, contains the names of thirty-five persons who did register and vote in respect of lands held by them under leases which imported to be made by joint lessors, and only executed by one of such lessors, and not conveying more than an undivided moiety of the said lands, which moiety was not of the clear yearly value of 10*l.* above all rents and charges payable out of the same.

Class No. 8, contains the names of thirty-five persons who

1838. did register and vote in respect of lands held under lease, which imported to have been executed under a power of attorney, but were not executed in the name of the person granting such power; and further, such person who is supposed to have granted such power was then a lunatic, and so continued to his death, which happened before the said election, and which leases were not sufficiently stamped.

Class No. 9, contains the names of twenty-eight persons who, after having been registered and before said election, sold, demised, or otherwise disposed of, part of the lands, and who did not retain to themselves, and in their actual occupation, a sufficient portion and interest therein to entitle them to be registered, or to vote.

Class No. 10, contains the names of seven persons whose freeholds had respectively determined at the time they voted at the said election.

Class No. 11, contains the names of five persons who, at and previous to the time they voted, were seized or possessed of a portion only of the lands and premises by virtue of which they had been admitted to be registered.

Class No. 12, contains the names of seven persons who had been admitted to be registered, and did register and vote in respect of lands held by them, by leases made to them, jointly, in common, or in partnership with other person or persons, after the first day of July, 1823.

Class No. 13, contains the names of thirty persons whose affidavits of registry were defective.

Class No. 14, contains the names of seven persons who, being duly registered as voters, tendered their votes at the said election, for Anthony Lefroy and Charles Fox, but whose votes were improperly rejected.

The statement of the sitting members :—

“ That the sitting members were duly elected, and that the majority of votes on the poll on their behalf was a good, valid, and legal majority.

“ That all the voters on the poll for the sitting members were legally entitled to vote at said election.

“ That by law the Committee have no right to inquire into the validity of any vote on the register, for any cause of objection which could have been taken at the time of the registry of each voter on the poll for the sitting members.

“ That if the Committee should, nevertheless, decide to inquire into the validity of votes on the register, or permit the petitioners to impeach or question the right or title of any voters on the poll for the sitting members, the sitting members will give evidence in support of the validity of the votes on the poll for them, which are alleged by the petitioners to have been struck off the poll of a former election, by a Select Committee of the House of Commons in the year 1837, as also of such other votes as are impeached by the petitioners. 1838.

“ The sitting members will apply for a commission to examine evidence in Ireland.

“ The sitting members will apply to the Committee to report the charges of bribery, intimidation, and corrupt practices, alleged against them in the petition, to be frivolous and vexatious.

“ The sitting members will give evidence that Charles Fox and Anthony Lefroy, Esqrs., candidates at the late election in the petition named, were, by themselves, their agents, managers, and friends, committee-men, partisans, and others on their behalf, guilty of acts of intimidation, and used undue influence and other illegal and unconstitutional means, whereby persons intending to vote for the sitting members were constrained and prevented from so doing; and that the said Charles Fox and Anthony Lefroy, by themselves, their agents and friends, committee-men, partisans, and others on their behalf, were guilty of acts of bribery, treating, and corruption, and of a variety of other illegal and unconstitutional acts and practices, in order to induce persons to vote for the said Charles Fox and Anthony Lefroy, Esqrs., whereby the said Charles Fox and Anthony Lefroy were disqualified from sitting for the said county of Longford.

“ That threats and declarations were openly made by persons belonging to the parties supporting the said Charles Fox and Anthony Lefroy, for the purpose of intimidating the electors, and preventing them from voting for the said sitting members.

“ That the sitting members have, in the accompanying lists, given lists of the votes on the poll for the said Charles Fox and Anthony Lefroy, at the said election, which they mean and intend to object to and impeach before the Committee to be chosen on the said petition, for and upon the several grounds stated and set forth in the said lists.”

1838. The following are the headings of the lists of the sitting members :

Class No. 1, contains the names of five persons registered as freeholders, under leases conveying no freehold estate, being determinable by notice in writing.

Class No. 2, contains the names of ten persons who had taken the benefit of the Acts for the relief of Insolvent Debtors in Ireland, at the time of their registration.

Class No. 3, contains the names of ten persons who had taken the benefit of the Acts for the relief of Insolvent Debtors in Ireland, since the time of their registry and before voting.

Class No. 4, contains the names of seventy-nine persons who, after having been registered and before the election, sold, demised, or otherwise disposed of, part of the lands, in respect of which they had been registered, and who did not retain to themselves, and in their actual occupation, a sufficient portion and interest therein to entitle them to be registered, or to vote.

Class No. 5, contains the names of 133 persons whose names ought to be struck off the poll ; the property in respect of which they registered and voted, not being of the nature and value prescribed by 2 and 3 Wm. IV. c. 88.

Class No. 6, contains the names of sixty-three persons who were not, at the time of the election, in the actual occupation of the lands and premises out of which they had qualified as voters.

Class No. 7, contains the names of seventy-eight persons who, after having been registered and before the election, sold, demised, or otherwise disposed of, part of the lands, in respect of which they had been registered, or who were not, at the time of their voting at the said election, in the actual occupation of the whole of such lands.

Class No. 8, contains the names of seventy-four persons not, at the time of their registries, respectively in the occupation of the lands, tenements, or hereditaments, in respect of which they were respectively registered, or in receipt of rents, issues, and profits thereof, for their own respective uses for six calendar months next, before such registries respectively, although the said lands did not come to the said persons respectively by descent, succession, marriage settlement, devise, or promotion to any benefice or office.

Class No. 9, contains the names of seventy-four persons

registered as 10*l.* freeholders, under leases, which appear, by the affidavits made on the occasion of their registry, not to have been executed six months previous to the dates of their registry respectively, although the lands had not come to such persons respectively by descent, succession, marriage settlement, devise, or promotion to any benefice or office.

1838.

Class No. 10, contains the names of seventy-four persons admitted to be registered as 10*l.* freeholders, under leases, which appear by the affidavits not to have been executed, or bear date six months previous to the date of the registry respectively.

Mr. *Austin* requested, that if the petitioners intended on the following day to enter upon the scrutiny, a list might be furnished him before-hand of the names of those voters with whom the petitioners intended to begin.

Mr. Serjt. *Spankie* objected to enter into any engagement to furnish such list; but during the evening of the same day apprized Mr. *Austin* of the course which was intended to be pursued by the petitioners.

On the 11th of February Mr. Serjt. *Spankie* was about to open his case, when Mr. *Austin* asked whether it was the intention of the petitioners to go into the general charges contained in the petition. Mr. Serjt. *Spankie* declined to give any pledge on the subject.

Mr. *Austin* then contended, that under the statement given in by the petitioners, they were precluded from going into those allegations of the petition. He referred to 42 Geo. III. c. 106, s. 3, and 47 Geo. III. c. 14, by which, in addition to the lists of objected voters, similar to those required in English and Scotch petitions, by 9 Geo. IV. c. 22, an interchange of written statements was required respecting all such matters and things as the parties, or either of them, mean to contend for or object to, and no witnesses are to be examined as to any matter not contained in the statement. He then proceeded to refer to the statement, for the purpose of showing that it did not con-

1838. tain any particulars as to the general allegations in the petition.

Mr. Serjt. *Spankie* here interposed, on the ground that the objection was premature: it would be time enough for the objection to be taken if, in opening the case, he should touch on matters from which he was excluded by his statement; and he proceeded at once to open the case, which he said would, in substance, be a scrutiny. He complained of the registration for the county of Longford in 1832, and those subsequent, as scandalous and fraudulent, and stated that many of the names which he sought to strike off had been already twice struck off, in compliance with the reports of Committees, since the registration in 1832. He then proceeded to state, that the poll-books had been lost, but that he was prepared to prove the loss, and to give secondary evidence of the contents.

The Chairman asked if there was any instance of a Committee having received secondary evidence of a poll-book?

Mr. Serjt. *Spankie*.—There is no case in which the poll-books of the election in dispute have been lost, but there are cases of secondary evidence having been given of old poll-books.

Mr. *Thesiger*.—We admit that the poll-book was lost, and waive all objection to the admissibility of secondary evidence.

Mr. Serjt. *Spankie*.—The evidence which we propose to adduce consists of the candidates' books, which were compared, at the end of every night's polling, with the original poll-books; and we propose to put in the check-books kept by the agents of the petitioners, and prove them to be correct.

Mr. *Thesiger* objected to this course: and it was at length agreed, that the books on both sides should be

compared, and the disputed names agreed upon after 1838. the Committee rose for the day, and that in the mean time such names should be proceeded with as were in the books on both sides.

The check-books kept by the agents of the petitioners were then produced; also the book kept by the clerk of the peace, containing the names of registered voters, the bundles of affidavits, and the printed alphabetical lists of voters.

MICHAEL GILLEASY'S CASE.

Mr. Serjt *Spankie* put in the affidavit of this voter, and stated that he was prepared to prove that the tenement for which he had registered was not of sufficient value, at the time of registration, to confer a right to vote, and that the objection had been taken before the assistant barrister; his name was in Class 3.

The Committee refused to enter into an examination of a voter's qualification, where his name stood on the register.

Mr. *Austin* objected to this evidence being received. The voter's name is on the register, and the Committee has no jurisdiction to inquire whether his name was properly placed there or not.

If Committees of the House of Commons open the Irish register, they in effect abrogate the Irish Reform Act. The Irish Reform Act, like the English and Scotch Acts, was intended to provide a cheap and efficacious way of ascertaining, before the commencement of an election, what persons are entitled to vote; and the means by which this object was to be obtained were by the establishment of a local impartial tribunal, by which questions respecting the right to vote may be tried on the spot where they arise, with every facility for the production of witnesses and the investigation of truth.

If the Irish register is to be opened by a Committee

1838. under the circumstances in which this vote is placed, it would be much better for Irish voters that the Irish Act should be at once repealed.

There is no sort of difficulty in the question, nor could it ever have been involved in obscurity, but for the mass of irrelevant matter which was introduced into the argument before the earlier Committees who were called on to give their decision upon it. If the question had originally been argued in the clear and masterly manner in which it was treated in the last Carlow case, no person of ordinary judgment and intelligence, lawyer or not lawyer, could have come to any other conclusion than that the register must be closed. If any difficulty or intricacy is now to be met with on the subject, it is entirely to be attributed to the erroneous decisions which have been made upon it, which unfortunately still remain, although the arguments by which they were obtained have long since been exploded and abandoned.

It is idle, in arguing this question, to introduce a mass of old law with regard to the effect of affirmative words in a Statute and negative words. The question must be looked at solely with reference to the three Reform Acts for England, Scotland, and Ireland, all passed in one year, upon one subject, and with one intention.

Each of those Acts establishes a system for the registration of voters ; each of them contains a clause, giving to Committees of the House of Commons, a certain specified qualified power over the voters so registered. In inquiries into the cases of English elections and Scotch elections, Committees of the House of Commons invariably confine themselves to the exercise of that limited power which is expressly given to them by the English and Scotch Reform Acts ; and this

being conceded, by what species of mental reservation 1838.
 can any one solemnly adjudicate, that Committees are
 not bound to adhere to the same line of conduct in the
 cases of Irish elections, which they have uniformly
 adopted in English and Scotch cases?

The argument on the other side is, that Committees of the House of Commons have unqualified power over all matters connected with elections, and cannot be deprived of that power by such clauses as those in the several Reform Acts.

Now it is unquestionable, that before the Grenville Acts the House of Commons did possess such a power; and if we look into English history, we shall see how they came by that power, how they used, how they abused, and how they finally abandoned it. We shall find, that the power was originally obtained by means of a series of popular, just, necessary, and laudable usurpations on the rights of the Crown, during that struggle for power, which commenced in the reign of Elizabeth, and terminated with the expulsion of James the Second from the throne. Anciently, writs for the return of members issued out of Chancery at the will of the Crown. The House of Commons subsequently carried their usurpation against the Crown to this extent, that during the session no writ should be issued without the warrant of the Speaker.

The next step was for the House to usurp to itself the power of inquiring into the conduct of the returning officer, and the mode in which he had executed the writ.

In 1703 the House of Commons had carried their usurpations to that stretch; and in the memorable case of *Ashby v. White* (1) they passed a series of strong resolutions, the effect of which was, that matters of

(1) 2 Lord Raymond, 938.

1838. election were examinable only by themselves. In asserting a still further power of exclusive jurisdiction over the rights of voters, they failed in consequence of the intrepidity of Lord Holt.

At the close of the 17th century, the House of Commons were safe from the encroachments of the Crown; they had the undisputed power of reviewing the conduct of the officer to whom the execution of writs for elections was entrusted, and that is all the power which they require for the purposes of the constitution, and all which they ought to have. From that time the House of Commons, so far from seeking to extend its usurpations further, has taken an entirely opposite course; and its care has been to devolve the power which it has acquired from itself into hands by which it could be more skilfully managed.

At that period all controverted elections were conducted at the bar of the House. This was found impracticable; and the first abridgment of the power of the House, was the passing a resolution, that the last decision as to a disputed right in any borough should be final. They next determined by a resolution, that no parties should appear unless they delivered lists between themselves. They next referred election cases to Committees of the House by common consent, and adopted the decisions of such Committees. At last the House of Commons, finding themselves perfectly safe as to their power, and perfectly incapable of using it, by 10 Geo. III. c. 16, sect. 14, (the first of the Grenville Acts, emphatically called *The Grenville Act*,) expressly abandoned all their power.

The preamble of that Act, in vague and obscure language, shadows out the mischiefs intended to be remedied. And on looking at Walpole's Memoirs and other contemporary works, the reasons will be seen

why the House utterly and irrevocably abandoned their power. There was still great difficulty in the exercise of the functions given to Committees. By the Reform Acts this evil was increased, by the extension of the franchise; and means were adopted to render the inquiry into disputed elections physically possible. By the Reform Acts, the sheriffs' power is so abridged as almost to be taken away: this is done by means of the registration clauses. The great principle of these clauses is, the establishment of an expeditious and efficient local tribunal, to determine who are the electors before the election begins. In order to accomplish this object, a great portion of the power formerly exercised by Committees is transferred to registering officers, who are in England revising barristers, in Ireland assistant barristers, in Scotland sheriffs.

And it is clear the object cannot be obtained unless the register is made to some extent conclusive.

If such then be the object, why is it to be defeated? The only answer attempted to be given to this question is, that power cannot be taken from the House of Commons except by express words. True, it may have been the intention of the House of Commons to deprive themselves of the power; but they cannot be deprived of it without its being expressly taken away.

Formerly, the Chancellor had all the jurisdiction in bankruptcy. By 1 and 2 W. IV. c. 56, the Court of Review in bankruptcy was established. There were no express words in that Act to take away the Chancellor's jurisdiction; yet, in the cases of *Exparte Lowe* (1) and *Exparte Benson*, (2) it was decided that the jurisdiction of the Chancellor was taken away by implication, by the erection of a new court, except so

(1) 1 Deac. and Chitty, 3.

(2) Ib. 338.

1838. far as it was expressly reserved. The principle thus established carries with it the consequence, that Election Committees are excluded from the old jurisdiction by the establishment of a new tribunal.

The English Reform Act gave several new rights of voting, and retained several old rights; but all on the condition of registration. In England, lists are made by town-clerks, overseers, &c. of all persons entitled to be placed on the register. The security for the accuracy of these lists is, that any person entitled to be on the lists may object to any other person on the list. The revising barrister inquires into cases in this list which have been objected to. The list is thus gradually purified and rendered complete, and when the election arrives, the power of the returning officer has almost vanished. Every person on the register may vote, and the sheriff cannot prevent them; he can make no scrutiny as to the right.

By 2 Wm. IV. c. 45, s. 60, a portion of the old power is reserved to Committees of the House of Commons; but the operation of that Act has deprived Committees of all their power, except what is thus expressly reserved. It is well stated by Mr. Rogers, that the power to impeach the English register is introduced in an affirmative proviso creating a special and limited jurisdiction, by reviving a former power, which, by the effect of the Act, had become defunct and destroyed.⁽¹⁾

The question is perfectly understood, and for ever set at rest in English cases. And the result is, that almost the whole of the English register is conclusively closed. Even the limited power of opening the register, reserved in the English Acts, is in many respects objectionable; and attempts were made in the last session to

(1) Rog. on Elections, 5th edit. 169.

remodel, and in great measure to get rid of, sec. 60 of 1838.
the English Reform Act.

In the Irish Reform Act, the power of Committees is taken away in the same manner as in the English, and there is no sec. 60.

In the Scotch Reform Act the schoolmaster makes out the lists; the lists go before the sheriff; and up to this point the English and Scotch Acts are precisely the same. In Scotland, there is an appeal from one sheriff to three. The lists, as in England, are annual, and the revision annual. By sec. 25 the power of inquiring into the register was reserved to Committees. On this point there have been two decisions. In the Linlithgow case, the question was raised on the votes of James Ritchie, (1) Robert Rennie, (2) & A. D. Tait; (3) and the Committee in all three cases refused to open the register, except so far as they were authorized by sec. 25. It was also raised in the Inverness case. (4) There the boundary of the county of Inverness was in dispute. In consequence of this dispute, forty votes were questioned, but they were not objected to before the sheriff, and their names were on the register. The Committee resolved unanimously that they would not inquire into the register.

In the Irish Reform Act, the power of Committees is taken away in the same manner as the Scotch, and there is no sec. 25.

The inconvenience of these sections in the English and Scotch Acts has been strongly felt; and there is a strong disposition to correct this inconvenience by abridging the power conferred by those sections.

But let us see accurately what is the state of the law as regards the opening of the English register. In

(1) P. & K. 298; C. and R. 365.

(3) C. & R. 369.

(2) C. and R. 368.

(4) K. and O. 305.

1838. theRochester case, the Committee most properly refused to receive any evidence which had not been tendered before the revising barrister; no witness was allowed to be called who was not called before the revising barrister; and no objection was allowed which had not been taken before the revising barrister. These rules were wise and commendable; for a strict construction of sec. 60 is in effect a liberal construction in favor of the franchise.

Now having gone through the law as regards England and Scotland, let us inquire into the question of the Irish register.

Here it may be observed, that the Irish register is not annual as in England and Scotland, but remains in force for eight years, and that courts are held for registration at every quarter sessions. And see what would be the consequence of opening the Irish register to the extent and with the restrictions imposed in English cases. In Ireland, every applicant for registration is objected to. Look at the distance from London; look at the question of value; look at the extent of the constituency in Irish counties; look at the number of quarter sessions, at which the various voters in every Irish county must necessarily have been admitted; and then say, what can be the object of opening the Irish register, either with or without restrictions, except for the purpose of placing every Irish constituency at the mercy of the wealthiest candidate?

In England, the restrictions imposed by Committees are intended to have the effect of diminishing the expense of controverted elections, and they necessarily have that effect; for there is only one circuit in each year for each revising barrister, and his revision only remains in force for a year. But in Irish controverted elections, the number of courts at which the various

voters have been admitted, the necessity of calling all the objectors and all the witnesses, who have attended the courts, to prove and sustain their objections, render the qualified opening of the Irish register far more injurious, more expensive, and more impracticable than the unqualified opening of it. 1838.

But, not to rely on arguments deduced from policy and convenience, the intention of the Irish Act was to increase the number of voters, and to limit the expense of contested elections. New voters are created, old ones are retained, as in the English and Scotch Acts; but all of them subject to the condition of registration. By section 13, no person is to vote unless he is registered. The registration is to take place before an assistant barrister, both a criminal and civil judge of great importance. Previous to the quarter sessions the voter is to send in notice of his claim. In England and Scotland, the voter is not, except in counties, the moving party in making out the list; it is the overseer or the schoolmaster; and the vote may be established without the voter being present; and if the voter is not objected to, his name must be placed on the register. In Ireland, the party must go himself before the assistant barrister and produce his title-deeds; the means are provided for a complete trial, (see sections 16, 17;) in fact, there is no tribunal in England or in the empire, and never has been since the Star Chamber, in which the judge is armed with such inquisitorial powers of inquiry as the Irish assistant barrister. He must examine the party on oath, whether his vote is objected to or not; and by section 42, a party who states what is false, or subscribes what is false, is subject to an indictment for perjury. There may be those who think that the terrors with which the law has surrounded the commission of the crime of perjury, are not sufficiently

1838. certain or effectual to deter a zealous partisan from braving them for the purpose of obtaining a vote. But, in the case of a voter objected to in Ireland before an assistant barrister, what could an attempt to commit perjury avail him, however reckless he might be of its consequences? The voter must produce his title-deeds; he cannot prevent the objector from calling any number of witnesses; and then to complete the investigation, which is almost always conducted by counsel on both sides, he is himself placed on the witness table, to be sifted, examined, cross-examined, re-examined, and completely riddled through with questions, before an experienced and enlightened judge, to whose decision alone are left both the law and the facts. What chance, what possibility is there, that the perjury of a voter should succeed before such a tribunal?

If the voter is dissatisfied with the decision of the assistant barrister, an appeal is open to him: in matters of law, to a judge of assize; in matters of fact, to a jury, directed by a judge of assize. No appeal is given against a voter where his name is placed on the register, for this simple reason, that the Irish Reform Act is liberal in its principles, and provides for enlarging the constituency; and it would have been contrary to its spirit to have given powers, the inevitable effect of which would have been the introduction of a system of legalised oppression over those whom it enfranchised. Section 28 provides for certificates to be given to the voters which are by that section made the proper evidence of the right to vote. The certificate is in the nature of an additional title-deed, and is left in the custody of the voter. The bundle of affidavits is left with the clerk of the peace, and this bundle of affidavits is, in fact, the register in Ireland. By section 54, the

certificate, or, in default of its production, the affidavit, 1838.
 is made conclusive of the right of voting; and it is enacted, that no inquiry whatever as to the right of voting, nor any scrutiny, shall be allowed. What did the man mean who penned this clause; what did the Legislature mean who adopted it, if they did not intend that the voter, once registered, could not be disturbed, except in the cases provided for by the Act? By section 59, disqualified persons who vote are made subject to penalties; and, in case of a petition to the House of Commons, the vote shall be struck off by the Committee, with such costs as to the Committee shall seem meet, to be paid by such voter to the petitioner.

Observe the contrast between the various enactments in the three different Acts. There is the greatest diversity in their details, but a complete uniformity in the main and characteristic object of making a register finally conclusive before the poll. In England and Scotland, there are doubtless numbers of persons on every register who have no qualification, yet the register is held sacred; and Committees unanimously agree in refusing to inquire into those bad votes. What then can be the reason, what the object, what the motive, which has ever induced a different result in the case of the Irish register?

Is it that the Irish assistant barristers, whose mode of appointment is precisely similar to that of the Irish judges, are less to be relied on than the sheriffs in Scotland, or than the vague revising barristers in England, who are annually appointed in batches by the senior judges on the respective circuits? It is loathsome to hear the imputations which it is the fashion of some persons to throw out against the Irish assistant barristers, a class of men embracing persons of every

1838. shade of political opinions. Such imputations are unfounded; they are monstrous.

But if the Irish registering tribunal should be admitted to be bad, a Committee of the House of Commons is incapable of exercising effectively the functions of a court of appeal from their decisions. Can a Committee of this House compel the production of title-deeds? Can they compel a voter to submit to examination; or rather, can they even listen to his testimony, should he be brought before them? How then can they take on themselves to review the decisions of an Irish assistant barrister, without the possibility of having the evidence before them on which he came to that decision? In this very case before the Committee, the assistant barrister may have admitted the right upon the evidence of the voter himself, after full discussion; but the Committee cannot have that evidence.

He came now to that mass of inextricable confusion which is presented by the decisions of the various Election Committees, on the question of opening the Irish register. It may truly be said of those decisions, that they resemble a tessellated pavement, containing every possible variety of conclusion to which the human mind could have arrived. It were useless to seek to classify or deduce any intelligible principle from those of them which have been in favor of opening the register. But there is one fact worthy of being mentioned, that subsequent to the first Carlow case, in May 1833, in which the register was closed, there never has been a single instance of the unqualified opening of the register. Hence, if five years uniform practice is to be regarded as conclusive, the unqualified opening of the Irish register may fairly be considered to have been abandoned. (1)

(1) Since this was sent to the press, the Belfast Committee have unani-

With regard to those cases in which the register 1838.
has been opened to a qualified extent, it is idle to attempt to reconcile or explain them. Each Committee has assigned a limit of its own, which limit has sometimes been varied as the case has proceeded; and the only thing which can be safely affirmed of them is, that each of these cases is an authority against every other, and in some instances against itself. It is not pretended that any one of these qualified decisions rests upon any ground of law, or argument, or reason; they are mere usurpations, exercised in the futile hope of effecting a kind of equitable compromise between unanswerable arguments on the one side, and erroneous decisions on the other. In point of policy and convenience, these qualified decisions are far more objectionable than the old unqualified opening, which has now for years been abandoned. In Ireland every vote is objected to, at least by one party; thus the limit is illusory and partial; but it is worse than that. In the second Carlow case, the register was opened to the extent of those cases which were objected to at registration. On one side an objection was proved in the case of every single voter objected to; the other side were not prepared to prove the formal fact of the objection in a single case. Thus they were stopped by a technical objection at the threshold of every inquiry. In the last Longford case the register was opened, and the effect of the complication of perjury and fraud which were practised before that Committee, were such as to occasion a special report; (1) from which it may fairly be collected, that the Committee

mostly decided in favor of the unqualified opening of the Irish register, without hearing Mr. Thesiger, who was to have argued in favor of the opening, the Chairman saying that it was unnecessary to trouble him.

(1) *Supra*, p. 42.

1838. had misgivings as to the propriety of their decision, and had the honor and courage to intimate the dissatisfaction and doubt which they felt as to the conclusion to which they had arrived. Such were the results of the two last cases of opened registers in Ireland; and as he had been personally engaged in both those cases, he felt justified in saying, that they exhibited the most complete mockery of justice that it had ever been his fate to witness.

Nothing now remains but a few short references to a living author who has written on this question. It is not often that we are in the habit of quoting the authority of living authors on questions of law, but in the present case, he thought he might be justified in doing so. The alterations which have been proposed with reference to election law in the present Parliament, would, if carried into effect, assign an assessor to each Election Committee. There was nothing violent or improbable in the supposition, that the author, from whom he was about to quote, might, if the present petition had been contested under the new law, have been sitting as assessor to this very Committee. Let him then suppose that such were actually the case, and let him be allowed to read to the Committee, the charge which he might be expected to give on the question which they were now called on to decide.

“ In the English Reform Act, sec. 60, the power to impeach the correctness of the register, by proving that a name has been omitted or retained, in consequence of the decision of the barrister, is introduced in the shape of an affirmative proviso, creating a special and limited jurisdiction, from which, according to familiar rules of construction, it may be assumed that something has preceded the proviso, which rendered its introduction necessary, and upon which it

can operate by reviving to a limited extent, and for special purposes, a former power which before had been general, but which by the effect of the Act had become defunct and destroyed.” (1) 1838.

“ The Irish Reform Act, 2 & 3 Wm. IV. c. 88, differs very materially from both the English and Scotch Acts. By sec. 17, like the Scotch, but unlike the English Act, it empowers and directs the registering barrister to investigate *every* claim, whether objected to before him or not.” (2)

“ Under the English Act, the register is held to be generally conclusive, because an express power is given to impeach its correctness only in the particular case of an appeal from the decision of the barrister : so in Ireland, where in fact there is no register, it would appear that the certificate must be held conclusive, except in the cases provided for by the fifty-ninth section, which indeed are quite consistent with the certificate, having originally been final, looking as that section only does to a state of facts, which have arisen subsequently to the granting of it. The power reserved to a Committee by that section, therefore, does not impeach the validity of the certificate itself, but the right to vote under it at a particular election.” (3)

“ In Ireland there is no register, and each man’s title to vote depends on his individual certificate, which is declared generally to be conclusive of the right ; but as there is no power given to the House to nullify or cancel the certificate, declared to be conclusive of the right of voting, it may well happen, that a Committee may strike a vote from the poll under the fifty-ninth section for a loss of qualification, or a supervening disqualification at one election, and that the voter might

(1) Rogers on Elections, 5th ed. p. 169.

(2) *Ib.* p. 170.

(3) *Ib.* p. 171.

1838. resume his qualification, or get rid of a disqualification, and vote, without impeachment, at a subsequent election.”(1)

“ The decisions upon the Irish Reform Act have hitherto been inconsistent and unsatisfactory.”(2)

“ With regard to the Irish Reform Act, future Committees will probably, after the decision of the third Carlow case, (3) limit the exercise of their powers to the cases provided for by the 59th section of that Act, amending the poll, in all cases where the objection is brought within the enactments of that section, without entering into the question of the validity of the certificate or registry, except in cases which might be suggested where the jurisdiction of the registering barrister might not have been properly created, and where consequently, the court not being competent, its judgments cannot be conclusive ; especially as it is expressly provided by section 32, ‘ that no registry hereafter to be made, shall be valid unless made conformably to the provisions of the Act.’ (*Vide* First Resolution, Cork City, K. & Ombl. 279.) But there seems to be no distinction in the power of a Committee, between voters objected to and votes not objected to at the registration ; they either have power in no case where the jurisdiction of the barrister is properly instituted, and where the facts are not within the enactments of the 59th section ; or they have it in all cases, which seems inconsistent with the express recognition of their special power contained in that section.”(4)

In conclusion, look to the doubt and indecision expressed in the special Report of the last Longford Committee. (5) Look to the second Carlow case, and say after that, if it is again possible for a Committee

(1) Rogers on Elections, 5th ed. p. 171, 172.

(2) *Ib.* p. 171.

(3) *Supra*, p. 3.

(4) Rogers on Elections, 5th ed. p. 173.

(5) *Supra*, p. 42.

to open the register. The jurisdiction of Committees enables them to inquire into acts of bribery, into intimidation, into improper conduct of a returning officer, and into the cases especially provided for by Statute ; but it extends no further. 1838.

The present contest is simply one of scrutiny, and the Committee are limited by section 59. The case of Michael Gilleasy does not come within that section, and the vote cannot be inquired into.

Mr. Serjt. *Spankie*.—The present question is not to be settled either by a reference to antiquated law, or by an historical account of the privileges of the House of Commons. There is no doubt, that all writs for the return of members, issued from the Court of Chancery, were returned, and their execution examined there.

There is no doubt that the House of Commons has delegated great part of its powers to Committees appointed under the Grenville Acts, and that the House of Commons are empowered and required to carry into effect the resolutions of those Committees. There is also no doubt—indeed it is universally admitted—that before the Reform Acts, Committees of the House of Commons had jurisdiction to inquire into the qualification of every voter, whose name was to be found on the poll of any election.

The simple question is, have the Reform Acts abrogated that power? And if this question can be fairly met, and satisfactorily disposed of, there will at once be an end of the controversy. It will not be at all necessary in the investigation of this question, to enter into an inquiry as to how far a prior jurisdiction can be taken away without express words. It will not be necessary to enumerate all the authorities which are collected in Viner's Abridgment, as to what words

1838. are sufficient to abrogate an existing law. It may be conceded at once, that this particular jurisdiction of Committees of the House of Commons may be taken away by Statute, without express words by an unequivocal demonstration of intention; but when there are no express clear words, the only way in which an old jurisdiction can be taken away is by a new Statute, so utterly inconsistent with the existence of the old jurisdiction, that the two cannot stand together: and in all such cases, the burden of showing that the jurisdiction is taken away lies on the party who assails it.

No lawyer pretends to dispute the propriety of the judgment of Lord Brougham in the case of *Exparte Lowe*; (1) or of the Vice-Chancellor in *Exparte Benson*, (2) which have been cited on the other side. The question in those cases arose in consequence of the creation of a new jurisdiction in matters of bankruptcy, which was inconsistent and repugnant to the old jurisdiction. The law laid down in that case is unquestionable; but it has no manner of bearing on the present question, and cannot be made applicable to it. Here there is nothing repugnant, nothing inconsistent in the co-existence of the ancient powers of Committees of the House of Commons with the new powers of the revising barristers; there is no rivalry, no conflict in their operations; one court is posterior to the other, and the only legitimate court of appeal from its decisions.

The arguments deduced on the other side, from the supposed intention of the Reform Acts, are rather calculated to elicit a smile than to call for serious refutation. The conflict and struggle of opinions, during the period of the passing of the Reform Act, is fresh in our recollection; yet so far was the regulation of the powers of Committees from being their para-

(1) 1 Deac. and Chitty, p. 3.

(2) lb. 338.

mount object, that no one will venture to assert that **1838.**
 the slightest allusion was ever made during their progress to any abridgment of the powers of Committees. So far were the framers of these Acts from entertaining any intention to interfere with the powers of Committees, that when the question actually arose, it took them completely by surprise ; and a Bill was introduced for the purpose of setting aside decisions which were declared, by the framers of them, to be contrary to their intention. (1) Yet after this short distance of time, with all the circumstances fresh before us, we are expected to listen gravely to long expositions of the intention of the framers of those Statutes, to remodel the constitution of Committees ; although we have the most cogent and conclusive grounds for the conviction, that neither the framers nor the opposers of those Statutes imagined that any question, as to the abrogation of the powers or privileges of the House of Commons, was in the slightest degree involved in the enactments, which night after night were so eagerly contested. The suicidal act of abrogating one of the most important branches of their power, which is now with so much confidence and hardihood attributed to the House of Commons, if it has been inflicted at all, which he denied, has been inflicted altogether unintentionally, and through inadvertence. We must indeed be required to forget all that is past, before we can be expected to acquiesce in the assertion, that the Reform Acts were passed for the purpose of limiting the power of Committees of the House of Commons. In passing those Acts, the House of Commons undoubtedly considered that it would be desirable to sweep away some of the inconveniences which encumbered the early stages of elections ; for this purpose a system of regis-

(1) Rogers on Elections, 5th edit. 166.

1838.

tration was created, by which the *primâ facie* claimants to vote might be ascertained. The object of this system was to diminish the scuffle and tumult, and protracted duration of a fifteen days' contest at the poll; to supersede the confusion and riots too often attendant on elections; to enable the solemn duty of selecting representatives to be performed in a sober and deliberate manner; and to purify elections from those enormities, which were acknowledged on all sides to be a disgrace to a civilized country, and utterly inconsistent with rational liberty.

This was what the Reform Acts were intended to accomplish, and they have succeeded in their object; for by means of registration the list of *primâ facie* voters is so far winnowed and purified, as to make it practicable to dispense with any scrutiny at the poll. Then comes the Committee of the House of Commons, with improved means of investigation; and by exercising a wholesome control over all the subordinate officers employed in the machinery of elections, prevents the accumulation of abuses, which if left unchecked would soon become intolerable. No human tribunal is tolerable from which there is no power of appeal; nor any consciousness in those who conduct its proceedings, that they are themselves subject to revision. The instant you shut the door of appeal you open the door of fraud and infamy.

It is from looking at the general scope of the Reform Acts that their intention is best collected; and when we find no indication of an intention to abolish the old jurisdiction, and can point out important advantages likely to arise from the preservation of both jurisdictions, a great step is made in establishing the position for which he contended.

He would not shrink from a comparison of the three

Reform Acts; for the result of that comparison must 1838.
lead to the conclusion, that a power of exercising a
sufficient control over the registering barristers was
intended to be reserved to Committees. With regard
to section 60 of the English Act, and section 25 in the
Scotch, so far from wishing to withdraw the attention
of the Committee from those provisions, he intended
mainly to rely upon them. It is a gratuitous and un-
founded assumption, to assert, that if those sections
had not been contained in the English and Scotch Acts,
the English and Scotch registers would have been
sealed, and the House of Commons would have been
deprived of all power of inquiry into them. If those
sections had not been enacted, Committees of the
House of Commons might, without all question, have
continued to exercise their old jurisdiction unimpaired.
It is indeed probable, that if there had been no section
60 in the English Act, Committees would, as a matter of
expedience, have adopted almost or quite the same
limited mode of opening the English register which
they have adopted. The main reason why Committees
have imposed a limit in opening the English register, is
not from considering themselves fettered by section 60,
but from considerations of policy and convenience. Un-
questionably, it is desirable to make the register final
at the poll, so far as it can be done consistently with
the preservation of an effectual and salutary con-
trol over those to whom the formation of the register
is intrusted. The object of section 60 of the English
Act was to insure to Committees the complete control
over the register; to obviate the possibility of any
doubt arising as to the intention of placing the regis-
tering barristers under their superintendence: it was
inserted from superabundant caution, not to limit the
power of Committees, but to exclude the possibility of

1838. a conclusion unfavorable to their power, in the only case in which a doubt as to that power could be raised. The insertion of section 60 is a strong argument to show the anxiety of the Legislature, to subject the conduct of revising barristers to the revision of Committees; but the absence of that section would have been no indication of an intention to leave the registering barristers unchecked by Committees.

Precisely the same observations apply to section 25 in the Scotch Reform Act. And looking at the nature of the tribunal to which the registration is subjected in Scotland, and the nature of the appeal which is given from that tribunal, it may fairly be assumed, that if in either of the three Acts, the register had been intentionally exempted from the control of Committees, it would have been in the Scotch Act.

In arguing this question, so far from shrinking from the principle, that the three Reform Acts were passed at the same time, for the purpose of introducing substantially the same system into the three countries, he should strenuously contend for it. One of the leading features of the English and Scotch Acts, is the subjection of the registers of those respective countries to the revision of Committees: does it not follow that the same power of revision ought to be extended over the Irish register, unless there is something in the Irish Act in direct opposition to such a conclusion? It is said, that section 59 in the Irish Act is analogous to section 60 in the English, and section 25 in the Scotch: but this is a complete mistake; the leading principle in the latter sections, is to subject the decisions of registering barristers and sheriffs respectively to revision. The former section has nothing whatever to do with the decisions of registering barristers, it merely provides for disqualifications subsequent to, and quite inde-

pendent of the registration; and no decision of a registering barrister can, under any possible circumstances, be called in question under its provisions. What are the grounds on which it is attempted to account for the Irish registering barristers being exempted from that control, which was considered essential in England and Scotland? The superior purity and excellence of the tribunal is at once brought forward, with the utmost complacency, to account for this seeming absurdity. But if the exemption was intentional, would not the same reason have applied *à fortiori* to the sheriffs in Scotland, who are a body of men of considerable judicial experience, and from whom judges of the Court of Session are frequently appointed? (1)

(1) With reference to the probable intention of the House of Commons, the following topic has been suggested to us, as likely to be used in future arguments. By the Irish Reform Act, sec. 66, it is enacted, "That the Lord Lieutenant, or other Chief Governor or Governors of Ireland, shall be and are hereby authorized by warrant, under his or their hand, to appoint, for the duty of presiding at the special sessions to be first held for registering voters under this Act, in any county, city, town, or borough, or in any two or more of such counties, cities, towns, or boroughs, any barrister or barristers, of not less than six years standing at the *Irish* bar, to be assistant to or deputies of the assistant barrister or chairman; and when two or more barristers shall be appointed for the same county, riding, city, town, or borough, they shall attend at the same place together, but shall sit apart from each other, and hold separate courts at the same time for the dispatch of business; and that all the powers, duties, rights, and privileges, given or imposed by this Act, to or upon any assistant barrister or chairman, are and shall be by virtue of such warrant given to and imposed upon such assistant barristers or deputies; and that all acts to be done by such deputies or assistant, shall be of the same efficacy in law, as if done by the assistant barrister or chairman, upon whom such duties would have otherwise devolved under this Act."

It is said, that the first registration in 1832, made by persons appointed under this very section, is the one which is mainly complained of; and that it is not probable that the House of Commons would have voluntarily surrendered into the hands of a tribunal so appointed the whole constituency of Ireland.

As this argument has not yet been noticed in any of the reports, the importance of the question of the Irish register, and the desirableness of presenting both sides of the question with perfect impartiality, and in such a manner as to render the future repetition of arguments upon it in our reports less necessary, have appeared to us to justify the present allusion to it.

1838. The further the argument is carried, the more cogently does the following question present itself: why should the register be subjected to revision in England and Scotland, and not in Ireland? In Scotland, before the Reform Act, there was a freeholders' roll, which answered in great measure the purposes of a register. This roll was made up by the freeholders at the Michaelmas head court. By 16 Geo. II. c. 11, any person who was improperly refused, on an application to be placed on the roll, or who was improperly struck off the roll, might apply to the Court of Session to be placed on the roll. Even under this imperfect system of registration, the judgment of the court of freeholders unappealed against, was generally conclusive on Committees of the House of Commons, though the power to examine was maintained. 1 Peckwell, 488. In Ireland, a system of registration was in operation before the passing of the Irish Reform Act, which was not conclusive on Committees. If in either of those countries it had been proposed to introduce a conclusive system of registration, it would have been more probable that it would have been introduced in Scotland, where a system of registration, in practice conclusive, was already in force, rather than in Ireland, where a system of registration, avowedly not conclusive, was in operation. If there is a reason in favor of a difference in the three Acts, it is emphatically in favor of the power of revision being extended to the preliminary proceedings in Ireland, rather than in England and Scotland.

An argument has been advanced, both in the present case and in the last Carlow case, founded on the alleged non-existence of a registry book in Ireland. It is stated, that the only register in Ireland is the bundle of affidavits. So far is this from being the case, that throughout the system of registration Acts in Ire-

land, beginning with 25 Geo. III. (Ir.) c. 52, and ending with the Irish Reform Act, we find constant reference to a registry book. By 60 Geo. III. and 1 Geo. IV. c. 11, s. 8, the clerk of the peace is required to appoint a person to attend at every election with the registry book and original affidavits of registry. By section 10, the deputy is required to refer to the registry book. By section 11, it is provided, that the deputy may take the vote of a person whose name appears on the registry book, without referring to the certificate or affidavit. It is also provided by that section, that if the voter's name is not on the registry book his vote is to be rejected. (1) By 10 Geo. IV. c. 8, s. 29, the clerk of the peace is required to keep the like books. By 2 & 3 W. IV. c. 88, s. 30, the indorsement on the affidavit is to contain the number of the entry on the registry book. By section 43, the clerk of the peace or his deputy is to attend the assistant barrister's court, and to take with him all and every such book and registry, as under and

(1) The following is the present practice at elections in Ireland, which appears to be founded on the provisions of this Statute.

The names of the voters are entered in the original registry book in their order, according to the date of their registration. The lists for the booths belonging to the separate baronies contain the names of the voters in the barony in alphabetical order, with the numbers in the original registry book. Each voter goes to the tally-room furnished with a slip of paper, on which his name is written, and his number on the registry book. The voter gives his tally-slip and certificate to the agent for his own party, who hands the certificate to the agent for the opposite party, and the tally-slip to the deputy sheriff. The deputy sheriff turns to the alphabetical register for the barony, in which, opposite the voter's name, he writes his own initials. If no objection is raised to the form of the certificate, it is handed up to the deputy sheriff, who writes his initials upon it. If the voter has no certificate, the deputy clerk of the peace, who attends with all the affidavits of the barony, produces the voter's affidavit, and if that is not objected to the deputy sheriff writes his initials on it. After these forms have been gone through, the voter is allowed to poll.

We are indebted to Mr. Gilmore, for this account of the mode of voting in Ireland. It appeared in evidence, in the last Carlow case, that several voters, who had neither certificate nor affidavit, were allowed to poll from the registry book.

1838. by virtue of the laws now in force in *Ireland*, or under this Act, such clerk of the peace, &c. is required to keep. By section 49, the sheriff must cause to be made, for the use of each booth, a true copy of the register of voters. By section 55, all election laws are to remain in force, save so far as they are altered by this Act. How then can it be contended, that there is no registry book in Ireland? And yet a great part of the argument in the Carlow case against opening the Irish register proceeded on this assumption.

The positions which appear to be established by the comparison of the three Reform Acts are, that a system of control was intended to be exercised over all the registering barristers and sheriffs; and that this intention is expressed in the English and Scotch Acts, for the purpose of preventing any doubt, although such control would have existed, even if it had not been expressly provided for; and that the same control exists over the Irish registering barristers, although it is not provided for in express words by the Irish Act. If we are required to give a reason for the omission in the Irish Act, it is sufficiently accounted for by the fact, of the existence of a previous system of registration in Ireland of the same nature, and, in many respects, identical with the present, which is admitted to have been subject to the control of Committees.

He would briefly allude to those sections in the Irish Reform Act, which bear most materially on the question. By sections 27 and 31, a certificate remains in force for eight years; sections 22 and 27 establish the proposition, that if a voter once gets a certificate, the production of it entitles him to its renewal; thus rendering a certificate, once obtained, perpetual. By section 32, no registry shall be valid unless made conformably to the provisions of the Act. Who is to ad-

judicate on the invalidity, unless that question is to be inquired into by Committees? He now came to the 54th and 59th sections of the Irish Reform Act, on which was the main reliance of the other side; they contending that, by section 54, the power of Committees appointed under the Grenville Acts to revise the registry was taken away. But this section would be found to apply merely to the poll and to scrutinies taken thereat. The main point on which the whole question turns is, whether section 54 makes the certificate merely conclusive as to the act of voting, or conclusive to all intents and purposes. The two preceding sections apply exclusively to the poll, so does the context in section 54; the poll is expressly mentioned throughout, and nothing else could have been contemplated. The same section also provided that no scrutiny should be allowed. Every one knows that the word "scrutiny" is technical, and applies to what used to take place at and after the poll. It was the examination which was formerly instituted by the sheriff that was abolished by the Irish Reform Act. The investigation of objected votes before Committees of the House of Commons was never technically called a scrutiny. The power of the House of Commons is of too high a nature to be ousted by the use of such an ambiguous word as "scrutiny," a word which, if not necessarily confined to the poll, would be satisfied at least by such a meaning.

The only remaining section is sec. 59, and it is only applicable to cases in which the voter has been guilty of a delinquency in giving a vote to which he knew he had no right, by reason of his having become disqualified.

The Chairman.—Has the barrister any right to object to such a vote?

Mr. Serjt. *Spankie*.—The barrister has no right to

1838. refuse a voter his certificate on account of his holding a disqualifying office: the voter may lose his office the next day, and then would be qualified. The only offence is his voting when he has the office.

He now came to the principle contended for by the other side, which was, that the investigation of voters' claims in Ireland was so complete and satisfactory, as to render an investigation by a Committee unnecessary. Look at the case of Scotland; there the voter is obliged to register every year, and the sheriff is obliged to keep a record of every vote, and the grounds on which it is claimed. The Scotch investigation far transcends the English, and is as careful as a preliminary investigation could well be made, yet Committees are not precluded from opening the Scotch register. He had no wish to assail the Irish registering barristers; but as the House of Commons had always been jealous of any thing tending to interfere with the purity of the constituency, it would be hardly consistent with their conduct on other occasions, that a set of persons directly nominated by the Crown, should be intrusted by them with the final settling of the register. It had been argued, that the production of the voter himself was the best mode of eliciting truth; but every one who knows human nature, will admit that nothing can be more dangerous than the evidence of a man in his own case. An elective franchise, which can be obtained by the oath of the voter, ought to be subject to control. It is true, there is an appeal to a jury and judge when the voter is rejected; but when the voter is placed on the poll there is no appeal. Surely this is little less than a premium to perjury. It has been said, open the register, and you abrogate the Reform Act. There is no foundation for such an observation. The votes of leaseholders, householders, and every

other class of persons entitled to the franchise, would remain; but the register would cease to be infected by persons whose only claim to the franchise is the hardihood of their swearing. His answer to the quotations which had been cited from Mr. Rogers was, first, that the speculative opinions of living authors were never treated as authorities; and, secondly, he would cite, in opposition to them, the opinion of Mr. Baron Richards, who, in the course of a very elaborate judgment on the question of value in Ireland, said, with reference to that question, "that the House of Commons was the only tribunal that could finally dispose of it." (1)

As to the considerations of expense and inconvenience, in arguing a question of this nature, topics of such descriptions were wholly out of place. Doubtless, it would be desirable to abolish all litigation, but it is impossible. When you check the power of control, men begin to usurp. The true cause of the expense has been, not the opening of the register, but the uncertainty whether it will be opened or not. If the register had been opened at once in the first instance, the pestilential inundation of bad votes would never have been inflicted on Irish constituencies.

He read the resolutions in the Cork case; (2) and stated, that he wished the example of that case to be followed, as the qualified opening of the register appeared to him most reasonable. By closing the register a premium is offered to perjury; but if the register is opened, crime ceases to be profitable, and will not be persisted in.

Mr. Austin in reply.—The argument which has just been delivered in favor of the qualified opening of the Irish register, has this novelty in it, that it aban-

(1) *Welsh's Report of Feighney's case*, p. 29.

(2) *K. & O.* 279.

1638. dons almost every position on which the supporters of that view of the Irish Reform Act have hitherto relied, and admits almost every important principle which has been contended for by its opponents. It is admitted in that argument, that the jurisdiction of the House of Commons is only an appellate jurisdiction from the returning officer; that the three Reform Acts are to be construed together; and that the whole question is, what is their intention? A great deal has certainly been said about the intention of the Legislature, but the way in which that intention has been inquired into, has been novel and almost ludicrous. It has been said, that the restrictions which were found practically to have been imposed on Committees by the English Reform Act, were contrary to the intention of the framers of that Act. A great many conjectures have next been made, as to the improbability of the framers of the Irish Reform Act having ever looked so far into the consequences of the measure which they introduced, as to foresee the restrictions which it would impose on Irish Election Committees: and from these premises, the conclusion is triumphantly drawn, that the Legislature never intended to oust Committees of their jurisdiction. But most assuredly, this is not the proper mode of arguing a question of intention. It is not the way in which the question has been argued or acted upon in the case of the English Reform Act: why should it be applied to the Irish Act? Notwithstanding the supposed intention of the framers of the English Act, no Committee has ever doubted that the English register was intended to be final; ninety-nine hundredths of the English register are in fact final; and there can be no question, that a petition founded solely on an expectation that a Committee would open the English register beyond the limits of

sect. 60, would be decided to be frivolous. It is irrelevant to argue on what would have probably been the opinions or acts of a majority of the House of Commons, if their attention had been called at the time of the passing a Statute, to all the possible remote consequences which might arise from it. The parties who prepare Bills are in a great measure the Legislature, so far as those particular Bills are concerned; and it is quite an immaterial inquiry, whether the numerical majority of the House of Commons, did or did not understand or assent to the principle and probable results of each clause which is enacted. 1838.

The language of all the three Reform Acts is irreconcilable with any other supposition, than that the register was meant to be final. This intention is as strongly shown in the Irish Act as in either of the three; and whether the necessary consequence of the restriction of the power of Committees was or was not contemplated, is quite immaterial.

The argument on the other side has not been a comment on the Acts of Parliament, but a political declamation. Evidence was tendered in the outset, that the objection was taken before the registering barrister; that ground was abandoned throughout the whole of the argument, and yet at the end of the argument, without a shadow of a reason being assigned, the Committee are called upon to adopt the resolutions in the Cork case.

It has been most properly conceded, that all the stuff from Viner's Abridgment, which was imported into the earlier arguments on the question, has nothing to do with the case. It is conceded, that if taking all the Acts together, it appears that the intention was to make the register final, the power of Committees is ousted. With these concessions, the principle laid

1838. down in *Exparte Lowe*, (1) and *Exparte Benson*, (2) disposes of the case. It has certainly been stated on the other side, that those cases have nothing to do with the present question; but as it must be admitted that it is mainly on the authority of those cases that Committees have refused to open the English register, (3) the mere assertion that those cases are irrelevant, will not be entitled to much weight. But the cases decided under the Bankrupt Act do not stand alone. The Grenville Act itself contains no words to take away the power of the House of Commons, yet that power is gone. This furnishes another instance of the proper mode of construing such statutes.

It is now stated, that the provisions of the English, Irish, and Scotch Acts were merely intended as a piece of machinery for obtaining a *prima facie* list. If that were all which was intended, such expensive machinery would have been unnecessary, and the duty might as well have been devolved upon overseers or school-masters as upon barristers.

Great pains and research have been bestowed on establishing the proposition, that there is a registry book in Ireland. It is not worth while, for the purposes of the present argument, to refute that assertion, for its existence or non-existence is altogether beside the present question.

It is said, too, that registration was no new thing in Ireland. Registration of voters was new; no such thing existed in Ireland before the Reform Act. There was a registration of freeholds in Ireland, so was there in England and Scotland.

In former times, it was found in England that vast numbers of freeholds were often created on the eve of

(1) 1 Dea. & Chitty, 3.

(2) *Ib.* 338.

(3) Bedford Case, C. & R. 60; and Oxford Case, C. & R. 159; P. & K. 87.

an election; and a number of Acts of registration were passed to remedy this mischief, by which it was provided that no one should vote for a forty shilling freehold unless it had been registered for a year. The origin of registration in Ireland was precisely similar. The title of the first Irish Registration Act, 2 Geo. I. (Ir.) c. 19, is for preventing fraudulent conveyances, in order to multiply votes for electing members to serve in Parliament. The title of 21 and 22 Geo. III. (Ir.) c. 21, is for preventing the multiplying votes. The object of 35 Geo. III. c. 29, and all the Irish Registration Acts, down to and inclusive of 10 Geo. IV. c. 8, was merely to register freeholds; and no freeholds were registered except those under 20*l*. By 37 Geo. III. c. 47, s. 12, express provision is made for objections being taken to a vote, under the old system of registration, before the returning officer at the poll. This provision at once gets rid of the force of any argument derived from the existence of a system of registration prior to the Irish Reform Act; for it shows that the registration was not of such a nature as to oust the jurisdiction of the returning officer, consequently it could not oust that of Committees. 60 Geo. III. and 1 Geo. IV. c. 11, extend the old provisions respecting registration to freeholds situate in counties of towns: 4 Geo. IV. c. 55, is confined to counties of cities and counties of towns. These Registration Acts, neither taken separately or jointly, ever extended to the whole constituency. 10 Geo. IV. c. 8, is by far the most complete Registration Act; but this does not attempt to give any thing more than an incomplete registration of freeholds. The registration under the old Acts was not meant to be comprehensive or final: there is nothing in any of them like sections 54 and 59 in the Irish Reform Act, like sec. 25 in the Scotch, or sec. 60

1838. in the English. Under the old Acts, no voter could poll without his certificate, but he was not entitled to vote merely from having the certificate: the Irish Reform Act, on the contrary, provides that every one who has the certificate shall vote; so that it may be safely asserted, that there is no analogy between the old Acts for registration in Ireland and the Irish Reform Act.

In Scotland, there was anciently a system of registration. Under that old absurd system of registration in Scotland, (1) Committees refused to inquire into the validity of a vote which stood on the register. If such a miserable shadow of registration could tie the hands of Committees, it is not too much to expect that, under an elaborate system, such as that introduced by the Irish Reform Act, Committees will respect the limitations expressly imposed by sections 54 and 59. There are two provisions in sec. 54; 1st, that the certificate shall be final; 2nd, that it shall be final at the poll. It has not been contradicted, on the other side, that the nature of the inquiries of Committees is only co-extensive with those of the returning officers: here the certificate is expressly made conclusive on the returning officer, therefore it is also conclusive on the Committee.

The provisions in sec. 59 are intended to apply to the cases of a voter having accepted an office, omitted to pay his taxes, received alms, or lost his qualification: thus the system provides for the certificate, and for the loss of its effect.

He would again recall their attention to one short sentence from Mr. Rogers, in which he has thus summed up the view which he takes of the question:—"With regard to the Irish Reform Act, future Committees will

(1) P. and K. p. 193, n.

probably, after the decision of the third Carlow case, 1838. limit the exercise of their powers to the cases provided for by the 59th section of that Act." (1)

A *dictum* of Mr. Baron Richards has been cited on the other side, in such a manner as to convey an impression unfavorable to the view taken by Mr. Rogers; but the observation of that learned judge is perfectly true and just. He says, (2) that the House of Commons is the only tribunal that can finally dispose of the question of value under the Irish Reform Act: doubtless it is so. That question can arise before a Committee, without opening the register. If a person has parted with a part of his qualification, the question may arise at once, under sec. 59 of the Irish Reform Act.

The only other argument which he would urge, should be the effect of sec. 27 of the Irish Reform Act, by which it is enacted, that on production of his certificate, a party shall be entitled to be re-registered. How completely does this show that the registration was intended to be final?

Resolved—"Not to open the register as affects the case of Michael Gilleasy."

MICHAEL REYNOLDS'S CASE.

Mr. Serjt. *Spankie* then proposed to proceed with Class No. 1. It is no objection to a voter that

Mr. *Thesiger* objected, that the heading of this list contained no valid objection; that if the facts stated in the heading were all proved, they amounted only to this, that the voter's name had been struck off the poll on a former election by a former Committee, which his name has been struck off the poll by a former Committee.

(1) Rogers on Election, 5th edit. 173.

(2) Welsh's Report of Feighney's case, p. 29.

1838. was no objection to the validity of his vote on the present occasion.

Mr. Serjt. *Spankie* stated, that although he was precluded from opening the register generally, he should in this case take refuge under section 59. Admitting that the vote of Reynolds was originally placed on the register properly, the subsequent decision that the vote was bad, by a competent tribunal, acted as a disqualification. He cited *Vooght v. Wynch*, (1) and *Strutt v. Bovington*, (2) and stated, that the parties on the present occasion, and on the former petition, were substantially the same.

Mr. *Thesiger* in reply, contended that the parties were not the same; that the petitioners in the last case were different from the present; and that the defendants were different, as there one member only had been petitioned against; here both the sitting members were petitioned against. According to the Oakhampton case, (3) and the Petersfield case, (4) the former decision is not receivable in evidence at all: but if the evidence is admitted, the judgment cannot go further than its contents; and the judgment is only, that Reynolds had no right to vote at a former election, which does not necessarily affect his right to vote at the last election. In this case it is conceded, that the voter was on the register; had his certificate and his affidavit; and that the sheriff was bound to admit him on the poll. In Coady's case, (5) the Speaker's warrant had gone forth; the affidavit had been removed from the records of the clerk of the peace; the name struck off the register; there was no certificate; and the voter been objected to on these grounds at the poll.

(1) 2 B. and A. 662.

(2) 5 Esp. 56.

(3) 1 Peck. 375.

(4) C. and R. 20; P. and K. 33.

(5) *Supra*, p. 38.

Resolved—"Not to open the register as affects the 1838. vote of Michael Reynolds."

Mr. Serjt. *Spankie* then gave secondary evidence of the lost poll-books, the arrangement for comparing the respective candidates' duplicates of the poll-books not having been carried into effect. Secondary evidence of lost poll-books.

The evidence consisted of proof of the loss of the poll-books, the production of the petitioners' books verified by the inspectors of the several booths, and proved by them to have been compared every night with the lost books, with which they corresponded in every respect. He was then about to proceed with Class No. 9, when the agent for the sitting members stated, that the majority for the second sitting member was 106, and that the petitioners had less than 80 objected votes left.

The Chairman.—As the majority of the second sitting member is 106, if the number which can by possibility be struck off is less than 100, what is the use of proceeding?

Mr. Serjt. *Spankie* claimed his right to proceed.

Mr. *Austin*.—There is no instance of a petitioner having been allowed to go on after it became impossible that the sitting member could be unseated.

Mr. Serjt. *Spankie* then requested to be allowed an adjournment, which was granted; and on the following morning he stated, that the petitioners had come to the resolution to withdraw from any further contest on their petition.

The following was the decision announced by the Chairman:—

"That Luke White and Henry White were duly elected as Knights of the Shire to serve in the present Parliament for the county of Longford. That the petition of Barry Fox and others was neither frivolous

1838. nor vexatious. That the opposition was neither frivolous nor vexatious."

The Chairman further stated, that the Committee had also unanimously agreed to the following special report:—

"The Committee, at the same time that they feel the fullest confidence in the legality and justice of their own judgment, upon the power of the House of Commons to open the register in Ireland, cannot but regret the conflicting decisions of previous Committees upon that question. They, therefore, beg to call the attention of the House to the subject, in the strong hope, that it will direct its early attention to a matter of such pressing importance."

CASE IV.

PETERSFIELD.

The Committee was chosen on the 13th day of February, 1838, and consisted of the following Members :

Hon. C. C. Cavendish (Chairman,) <i>East Sussex.</i>	
H. J. Winnington, Esq. <i>Worcestershire, W.</i>	J. E. Wemyss, Esq. <i>Fifeshire.</i>
William Turner, Esq. <i>Blackburn.</i>	J. Maher, Esq. <i>Wesford Co.</i>
S. White, Esq. <i>Leitrim Co.</i>	J. Ramsbottom, Esq. <i>Windor.</i>
Lord Viscount Northland, <i>Dungannon.</i>	W. Wilkins, Esq. <i>Radnorshire.</i>
R. M. Bellew, Esq. <i>Louth Co.</i>	J. I. Blackburne, Esq. <i>Warrington.</i>

Petitioner—Cornthwaite John Hector, Esq.

Counsel—Mr. Austin and Mr. Cockburn.

Agents—Messrs. Parkes and Preston.

Sitting Member—Sir W. G. Jolliffe, Bart.

Counsel—Mr. Thesiger, Q. C., Mr. Talbot, and Mr. Wortley.

Agents—Messrs. Currie and Co.

Mr. *Austin* opened the case for the petitioner. The poll-books were produced, and printed copies of the lists revised by the barristers, but no register. (1)

(1) The proper person to have received the revised lists and to have made out the register, was the steward of the Lord of the Manor; but the steward not being present at the revision, the revising barrister gave the revised lists back to the overseers, who had them printed, and no register was ever made. No discussion, however, upon the subject took place before the Committee.

RICHARD LEGG'S CASE.

The qualification of this voter was described in the list made out by the overseers to be "a house and land," the qualification consisting of "a barn, stable, outhouses, and 120 acres of land." An objection was made to the name being retained upon the list, and the revising barrister struck it out, refusing to amend the description. Legg tendered his vote at the election in 1837, and, after hearing counsel, the vote was unanimously allowed by the Committee.

The vote of Thomas Tigg was also added to the poll for the petitioner, after evidence had been heard respecting the value of his qualification. The sitting member then abandoned the defence of his seat; and the Committee decided—

That Sir William George Jolliffe, baronet, is not duly elected a burgess to serve in this present Parliament for the borough of Petersfield.

That Cornthwaite John Hector, esquire, is duly elected.

That the Committee have altered the poll by adding thereto the names of Richard Legg and Thomas Tigg.

CASE V.

S A L F O R D.

The Committee was appointed on Tuesday, the 6th of February, 1838, and consisted of the following Members :

Earl of Euston (Chairman,) <i>Thetford.</i>	
Lt.-Col. Henry Salway, <i>Ludlow.</i>	Thomas Bewes, Esq. <i>Plymouth.</i>
Nicholas Fitzsimon, Esq. <i>King's Co.</i>	G. J. Heathcote, Esq. <i>Lincolnshire.</i>
J. R. Ormsby Gore, Esq. <i>Carnarvonshire.</i>	Lord C. S. Manners, <i>Leicestershire, W.</i>
Lord Viscount Maidstone, <i>Northamptonshire, W.</i>	W. N. Macnamara, Esq. <i>County of Clare.</i>
Captain Alexander Ellice, R. N. <i>Harwich.</i>	Gen. Hon. J. B. R. O'Neill, <i>County of Antrim.</i>

Petitioners—William Garnett, Esq. and Electors in his interest.

Sitting Member—Joseph Brotherton, Esq.

Counsel for the Petitioners—Mr. Thesiger, Q. C., Mr. Bellasis, and Mr. Wrangham.

Agents for the Petitioners—Messrs. Dorrington, Hayward, and Co.

Counsel for the Sitting Member—Mr. Austin and Mr. Rushton.

Agents for the Sitting Member—Messrs. Parkes and Preston.

THE lists of the petitioners in this case were in the following form :

“Lists of voters intended to be objected to on the behalf of the petitioners.”

Name.	Number on the Register.	Grounds of objection.	In the list of objections, the petitioners having by mistake referred to the wrong number on the regis-
John Oldham.	2063		

The returning officer made up the register of the voters in the borough from the lists signed by the

1838. revising barrister, in compliance with the directions of the Reform Act, but he published the register divided according to the districts into which, for the convenience of polling, he divided the borough; and instead of printing the numbers opposite to the names of the voters in the register in his possession, re-numbered the published lists in each district. The numbers opposite to the names upon the published lists, were by mistake inserted in the lists of objections, which consequently differed from the register. The poll was taken with reference to the published lists, but the fullest opportunity was given to both parties to refer to the original register in the course of the preparation of their respective cases.

ter, the
Committee
refused to
enter into
the consi-
deration of
the vote.

Mr. *Thesiger*, after the production of the poll-books and the register of the borough, by the returning officer, proposed to proceed with the first voter named upon the list of the objections of the petitioners, and objected to the vote of John Oldham.

Mr. *Austin* resisted the consideration of this case. Number 2063, placed opposite to the name of the voter, and purporting to be the number of the voter upon the register, did not in the register refer to John Oldham.

Mr. *Thesiger*.—The lists contain every thing material for the support of the objection, and all that the Act requires. The name of the voter is given, and a distinct statement of the objection to his vote. The number given is that placed by the returning officer opposite to the name in the printed list.

Mr. *Austin* in reply.—The objection is a strictly technical one. The voter is liable to lose his vote on technical objections of a similar character, and it would be unreasonable to prevent him from relying on a technical defence. If he had removed, after being registered, from a house of the yearly value of 30*l.* into a

house of the yearly value of 100*l.*, he would have lost his vote. The returning officer made out the register in compliance with the Act, and the agents of the petitioners obtained an order to inspect it. The objection might have been prevented if proper care had been taken ; as it is, the means of identifying the voter are not accurately given, but on the contrary, the reference tends to mislead. 1838.

The objection was allowed ; and as it applied to nearly the entire list delivered in by the petitioners, the petition was abandoned.

The Committee reported that the sitting member was duly elected ; and that neither the petition nor the opposition to it were frivolous or vexatious.

CASE VI.

I P S W I C H.

The Committee was chosen on Tuesday, the 6th of February, 1838, and consisted of the following Members :

R. Jenkins, Esq. (Chairman,) <i>Shrewsbury.</i>	
M. E. Parker, Esq. <i>Devonshire.</i>	Sir R. Heron, Bart. <i>Peterborough.</i>
T. W. Bramston, Esq. <i>Essex, S.</i>	R. B. Hale, Esq. <i>Gloucestershire, W.</i>
T. E. Winnington, Esq. <i>Bewdley.</i>	H. Broadley, Esq. <i>Yorkshire, E. R.</i>
Hon. Lt.-Col. J. C. Westenra, <i>King's Co.</i>	Hon. Lt.-Col. G. L. Dawson Damer, <i>Portarlington.</i>
W. Evans, Esq. <i>Derbyshire.</i>	R. Archbold, Esq. <i>Kildare Co.</i>
Sitting Members—Thomas Gibson, Esq. and Henry Tufnell, Esq.	
Petitioners against Mr. Gibson—	
Turner and others, Electors in the interest of Rigby Wason, Esq.	
Petitioners against Mr. Tufnell—	
Cobbold and others, Electors in the interest of Fitzroy Kelly, Esq.	
Counsel for T. Gibson, Esq. and for Petitioners in the interest of F. Kelly, Esq.	
Mr. Thesiger, Q. C., Mr. Talbot, and Mr. Wrangham.	
Agent—Mr. Wilkinson.	
Counsel for H. Tufnell, Esq. and for Petitioners in the interest of R. Wason, Esq.	
Mr. D. Pollock, Q. C., Mr. C. Phillips, and Mr. Austin.	
Agent—Mr. Lawrance.	

THE petition against Mr. Tufnell contained charges of bribery and treating, and complained that the names of many persons who were not qualified, or had lost their qualification, had been improperly placed on the

poll; and that others who tendered themselves were 1838.
improperly rejected. It prayed that the election of
Mr. Tufnell might be declared void, and that Mr. Kelly
might be declared duly elected in his stead.

The petition against Mr. Gibson was of a similar
nature; and prayed that the election of Mr. Gibson
might be declared void, and that Mr. Wason might be
declared duly elected in his stead.

The following are the headings of the lists of voters
objected to, delivered in support of Cobbold's peti-
tion: (1)

Class 1, contains the names of thirty-three voters whose
votes are intended to be objected to, on the ground that the
said several voters had not, at the time of the polling at the said
election, the same qualification for which their names were ori-
ginally inserted in the register of voters then in force for the said
borough, but had, since the 31st day of July, 1836, and previous
to the said election, ceased to occupy the whole or a part of the
premises for which they were respectively registered, and claimed
to vote at the said election.

Class 2, contains the names of twelve voters, objection, that
they did not, at the time of their registration, respectively occupy
premises of the actual value required by law.

Class 3, contains the names of nine voters, objection, not
in occupation of premises for twelve calendar months next
previous to the 31st day of July, 1836.

Class 4, contains the names of seven voters, objection, that
on the 31st July, 1836, the period of their registration, they were
not in the legal occupation as owners or tenants.

Class 5, contains the names of five voters objected to, for
not having resided for six calendar months next previous to the
last day of July, 1836, within the borough of Ipswich, or within
seven statute miles from the place where the poll for the said
borough was taken, up to and before the passing of the Act
2 Wm. IV. c. 45.

Class 6, contains the names of four voters objected to, for
non-residence for six calendar months before election.

(1) The headings of the lists are abridged so as to give little more than
the nature of the objections.

1838. Class 7, contains the names of three voters objected to, for having received parochial relief or other disqualifying alms, within twelve calendar months next previous to the 31st day of July, 1836.

Class 8, contains the names of three voters objected to, for having received parochial relief or alms within twelve calendar months next previous to the election.

Class 9, contains the names of nineteen voters whose votes are intended to be objected to, on the ground that they were or had been, either during the said election or within six calendar months previous thereto, or within fourteen days after it was completed, employed at such election as agents, attorneys, poll-clerks, flagmen, or in some other capacity, for the purposes of such election ; and had either before, during, or after such election, accepted or taken from the said H. Tufnell and Rigby Wason, or from some other person for or in consideration of or with reference to such employment, a sum or sums of money, or retaining fees, offices, places, or employments, or promises, or securities, for a sum or sums of money, retaining fees, offices, places, or employment.

Class 10, contains the names of four voters objected to, for not having been rated as required by 2 Wm. IV. c. 45, during the twelve months next preceding the 31st July, 1836.

Class 11, contains the names of eight voters objected to, for not having paid on or before the 20th day of July, 1836, all the poor-rates which had become payable previously to the 6th day of April preceding.

Class 12, contains the names of seven voters objected, to for not being registered ; their names and descriptions as they appear in the poll-books not being upon the register.

Class 13, contains the names of eight voters objected to, on the ground that they asked, received, or took money or reward, by way of gift, loan, or other device, or agreed or contracted for money, gift, office, employment, or other reward, to give their votes to Tufnell and Wason, or one of them, or to refuse or forbear to give their votes to Gibson and Kelly, or one of them.

Class 14, contains the names of four voters objected to, on the ground that they bribed or attempted to bribe.

MISCELLANEOUS OBJECTIONS.

1838.

1. S. Hayward, not registered, but falsely represented and personated a deceased voter of the same name who was upon the register of voters.

2. J. Keeble, improperly recorded in the poll-book for Messrs. Wason and Tufnell, although the vote was in fact tendered and given on behalf of Messrs. Gibson and Kelly.

N.B. His name was altered by consent, and recorded for Gibson and Kelly.

3. M. O. Iron, improperly recorded in the poll-book for Messrs. Kelly and Wason, although the vote was in fact tendered and given for Messrs. Kelly and Gibson.—Struck off on ground of change of occupation.

Two voters objected to as felons convict.—Not gone into.

List of voters objected to on Turner's petition :

Class 1, contains the names of seven persons objected to : 1st, For that they and each of them asked for money or other reward to vote at the election ; 2nd, For that they and each of them were bribed to vote at the election.

Class 2, contains the names of one hundred and nine persons objected to, as having all and each of them received meat, drink, lodging, entertainment, or provision, or tickets for drink, entertainment, or provision, for voting at the said election.

Class 3, contains six names objected to for bribery.

Class 4, corresponds with Cobbold's Class 1, and contains the names of twenty-six persons objected to : 1st, For that they and each of them had ceased to have, and had not at the time of voting, the same qualification for which their names were originally inserted in the register ; 2nd, For that they and each of them had ceased to occupy, at the time of voting, the premises for which they were respectively registered.

Class 5, corresponds with Cobbold's Class 6, and contains ten names.

Class 6, contains the name of one person objected to, for having been, within twelve calendar months previous to the said election, concerned or employed in the charging, collecting, or managing the duties of the customs, or some branch thereof.

Class 7, contains the name of a person objected to : 1st, For that he was a minor, and not of the age of twenty-one years as required by law, at the time of registration or voting ;

1838. 2nd, That he did not occupy the premises for which he was registered, either as owner or tenant thereof.

Class 8, corresponds with Cobbold's Class 4, contains the names of three persons.

Class 9, corresponds with Cobbold's Class 3, contains the names of two persons.

Class 10, corresponds with Cobbold's Class 2, contains the names of thirteen persons.

Class 11, corresponds with Cobbold's Classes 10 and 11, contains the names of two persons.

Class 12, corresponds with Cobbold's Class 8, contains the names of eight persons

Class 13, corresponds with Cobbold's Class 5, contains the names of seven persons.

Class 14, corresponds with Cobbold's Class 7, contains the names of four persons.

Class 15, contains the names of two persons whose votes are objected to: 1st, For that they and each of them were not registered nor upon the register; 2nd, For that they and each of them personated voters upon the register.

Class 16, corresponds with Cobbold's Class 9, contains the names of thirteen persons.

Class 17, Samuel Norman.—This person is objected to, 1st, For that there is no such voter upon the register; 2nd, That he was not duly registered.

Class 18, Robert Bowman, sen.—This person is objected to, for that he was erroneously entered on the poll as having tendered and given his vote for Messrs. Kelly and Gibson, whereas he tendered and gave his vote for Messrs. Tufnell and Wason; and the petitioners will pray that the poll be duly corrected.

In case the Committee should determine to inquire into the validity of votes upon grounds which might have been taken before the revising barrister, but where no objection was made against the voter before the barrister, the petitioners will further insist upon the objections contained in the following classes:

Class 19, contains the names of seven persons objected to, for non-occupation at the time of registration.

Class 20, contains the names of four persons objected to, for non-occupation for twelve calendar months before the last day of July, 1836.

Class 21, contains the names of seventeen persons objected to, for under value. 1838.

Class 22, contains the names of twelve persons objected to : 1st, For not having been rated for twelve calendar months preceding the last day of July, 1836 ; 2nd, For non-payment rates.

Mr. *Thesiger* shortly opened the case, which he said would resolve itself entirely into a scrutiny. The election took place on the 26th July, 1837, and at the close of the poll the numbers were—

Gibson	601
Tufnell	595
Kelly	593
Wason	593

He proposed to begin with Class 1, in which the objection was, that the voters had removed, and parted with their qualification subsequently to the 31st July, 1836.

The returning officer for the year 1837 was then called, who produced the original poll-book, which had not been out of his possession.

And the town-clerk produced the register of voters in force at the last election.

PHILIP PISEY'S CASE.

He was objected to under Class 1, and polled for Tufnell and Wason. The collector of the poor-rate proved a receipt of poor-rates from Pisey in April 1837, for rates to Midsummer 1837, in respect of the house for which he was registered; and that Pisey then said to the collector, " this is the last quarter you will receive of me, as I am going to leave." Where the tenancy continues, the voter is not disqualified by ceasing to occupy under circumstances which do not negative an intention of returning.

The next rate was dated 28th July, 1837, two days after the election, in which rate Pisey's house was entered as empty. It was proved, that Pisey removed a waggon-load of goods from the above house to

1838. Somersham, a place some miles distant from Ipswich, a few days before Midsummer 1837, where he established a school; that the house in Ipswich was shut up from that time till Michaelmas 1837, when it was put into repair and fresh tenanted. The owner of the house in Ipswich was called in support of the vote, to prove that Pisey continued to pay rent for the house, and kept the key till Michaelmas 1837; that he never received or gave notice to quit, but said he wished to try how his school at Somersham would answer before he gave up his house at Ipswich.

Mr. *Talbot*, in opposition to the vote, relied on the English Reform Act, 2 Wm. IV. c. 45, s. 27, which enacts, that every person who shall occupy within a borough, as owner or tenant, premises of the clear yearly value of 10*l.*, if duly registered, shall be entitled to vote. It is not sufficient that the premises should be held by a tenant; they must be occupied. By 59 Geo. III. c. 50, it is enacted, that no person shall acquire a settlement by renting a tenement, unless such tenement shall consist of a house or building, or of land, nor unless such house or building shall be held, and such land occupied by the person hiring the same, for the term of a whole year; and in the case of *R. v. Inhabitants of Stow Bardolph*,⁽¹⁾ the distinction was recognized between the words “held” and “occupied;” and it was on this distinction that a pauper, who had rented a house for a year, and abandoned it a few weeks before the termination of the year, was held to have gained a settlement, on the ground that the relation of landlord and tenant continued, although he had ceased to occupy. He also referred to John Stock’s case, Bedford.⁽²⁾

(1) 1 B. & Ad. 219.

(2) C. & R. 91; P. & K. 143.

Mr. D. Pollock contended, that it was not necessary 1838.
 that there should be personal occupation to enable a party to vote; it was sufficient that the tenancy should continue; and in the present case the continuance of the tenancy to Michaelmas was not disputed. He also relied on the evidence which had been given in support of the vote, to show that the voter had not abandoned the premises, but at the time he left them had expressly declared his intention of returning, in case his school at Somersham did not succeed.

The Committee decided the vote to be good.

JOHN PRENTICE'S CASE.

Class 1, voted for Tufnell and Wason. It appeared, Where the premises are shut up, and there is no intention of returning, the voter is disqualified, although his tenancy continues.
 by the evidence of the poor-rate collector and of other witnesses, that prior to Midsummer 1837 he had paid rates for a house in the Butter-market, for which he had been registered; that before the end of June 1837 he quitted that house, and removed to a house opposite; that a placard of "house to let" was put up on the house for which he had been registered; that it was shut up, was returned "empty" by the rate collector, and the words "removed opposite" placed on the shutters. Prentice was proved to have left a few articles in the house from which he removed, till a few days before Michaelmas 1837; to have kept the key up to Michaelmas 1837; and to have held himself out as entitled to let the house to a person who wished to become tenant of the house.

Mr. D. Pollock contended, that as an actual tenancy subsisted between Prentice and his landlord, and Prentice had kept the key of the house from which he had removed, and left some of his goods there, he had not lost his qualification.

Mr. Thesiger.—The question is, not whether Pren-

1838. tice remained tenant of the premises, but whether occupation, strictly so called, is necessary as a qualification of a voter under 2 Wm. IV. c. 45, s. 27. In the present case, all intention of returning, and all demonstration of such intention, is wanting; and although Prentice kept the key, yet a mere symbolical occupation is not sufficient to satisfy the meaning of the Statute. The whole question is, whether the occupation is such as would have entitled Prentice to be registered by the revising barrister.

The Committee decided the vote to be bad.

MARK OLIVER IRON'S CASE.

The voter was registered for a "house," he changed to the next door before the election, but remained in possession of his former workshop, worth 8*l.* per annum, and part of his former garden, worth 2*l.* per annum. Vote held bad.

Class 1, polled for Wason and Kelly. The rate-book was produced; from which it appeared, that in January 1837 he was rated for a house in the Butter-market, for which he had been registered, and the entry of his qualification in the register was "house." In the rate for April 1837 he was rated for a smaller house in the Butter-market, next door to the house for which he had been registered, which latter house was entered "empty" on the April rate.

In the July rate, Iron was rated for the smaller house, and a fresh tenant was rated for the larger house.

It appeared in evidence, that Iron had removed from the larger to the smaller house at Lady-day 1837, and that part of the premises of the larger house were, at the time of his removal, parted off, and thrown in to form part of the premises of the smaller house. These additions to the premises of the smaller house consisted of a workshop, and some bits of garden ground. The workshop abutted on the smaller house, had a separate outer door, and did not communicate with it internally. The witnesses in support of the vote placed

the value of the workshop alone at 8*l.* a year, and the value of the workshop and bits of garden together at 10*l.* a year. 1838.

Mr. *Talbot* contended, that the land and house were of such a character as to be properly one, and properly registered under the term "house;" and that if the Committee believed the statements of his witnesses, Iron had continued to occupy a portion of the premises for which he had been registered, of the annual value of 10*l.*, beyond the time of the election, and consequently was entitled to vote, on the authority of Thomas Wythe's case, Droitwich. (1)

Mr. *Austin*.—The decision in the Droitwich case was, that where a voter was registered for "house and land," and continued to occupy the house up to and after the election, he might, if the house were of sufficient annual value to confer a vote, give his vote in respect of the house, although he had parted with the land before the election.

In the present case, Iron was registered for a "house," not for a "house, shop, and garden;" and as he was registered for a "house" alone, it appears, on reference to 2 Wm. IV. c. 45, s. 27, that the value of the house alone must confer the qualification.

Now had Iron, at the time of the election, the same qualification as that on which he registered?

It has been decided, by the highest authority, that the *same* qualification means the *identical* qualification for which the voter registered. If he removes from the house for which he registered to another of double the value, separated from the former only by a party wall, he cannot answer the third question without subjecting himself to an indictment for a false answer. (2)

(1) K. & O. 53.

(2) The case here referred to was an indictment for a misdemeanor in falsely answering the third question at the poll, tried at the Middlesex

1838. In the present case, it is immaterial whether the workshop was or was not part of the smaller house, for the voter registered for the larger house, which he had ceased to occupy, so that the occupation of the workshop could not in either case entitle him to vote. Even if the workshop were part of the qualification on which the voter registered, the highest annual value which had been set on it was 8*l.*, which was insufficient.

The additions to the garden clearly could not be included under the title "house," which was the qualification on which the voter registered; and as the case made out on behalf of the voter was, that the additions to the garden were necessary to make up an annual value of 10*l.* for the part which the voter continued to occupy, the vote must be held bad.—Vote struck off.

ROBERT BOLEY'S CASE.

The Committee will entertain an

Class 1, polled for Tufnell and Wason; was rated, in the rate for July 1836, for the house for which he

sittings after Michaelmas Term 1837, before Lord Denman, C. J., and a special jury. In which Lord Denman in summing up the case to the jury observed, That as questions had arisen in the course of the case as to some of the provisions of the Reform Act, he thought it right for him to give his opinion on those provisions, which might have the effect of setting at rest some of the doubts which had arisen out of that Act. His opinion was, and he had no doubt whatever about it, that where a party had ceased to have the identical qualification upon which he registered, he would not be entitled to vote, merely because he was possessed of a property falling within the general terms of the description which he had given to the revising barrister. It was not sufficient for a party to say, "I was in No. 1 at the time of the registration, but I have since then gone to live at No. 2; and No. 2 is as good a qualification for a vote as No. 1." In order to enable a party to vote, the identity of the qualification must continue. The defendant had changed his qualification, and then stated that his qualification was the same. There could be no doubt that this statement was untrue; but the question for the consideration of the jury would be, whether the defendant knew the statement to be untrue. Verdict: Not Guilty.—*Reg v. Dodworth, MSS. Thursday, Dec. 21, 1837.*

was registered. In September 1836, before the registration, he removed to another house, and was succeeded by a new tenant. 1838.

Mr. Talbot cited the *Droitwich* case (1) against this vote. The objection could not have been taken before the revising barrister, for the voter had occupied up to the 31st July, 1836, so that a Committee of the House of Commons was the only place where the objection could be taken.

objection
which arises
between the
31st July
and the re-
gistration.

Mr. D. Pollock endeavoured to distinguish this case from the *Droitwich*, on the ground, that in that case the removal in fact took place between the registration and election.—Vote struck off.

JAMES RICE'S CASE.

Class 4, corresponding to Class 1, polled for Gibson and Kelly. Had registered before 1835 for a house, the whole of which, except a shop and cellar, he under-let to one Ensor in November 1835. Ensor continued to occupy the premises thus let to him from that time down to and after the election. The house was mortgaged, and Ensor paid the rent to the mortgagee from December 1835. Rice also paid the mortgagee, 14*l.* a year, for the shop and cellar. In March 1837 Rice became bankrupt, and the shop and cellar were closed for about a week after the bankruptcy, and shortly after re-opened by Birch, the foreman of Rice, who carried on the business in Rice's name till October 1837. Birch refused to enter into partnership with Rice; but when the business was wound up in October 1837, he received half the profits, in addition to his weekly wages as foreman, and deducted half the rent of the shop and cellar from March till October.

Where a
voter prior,
to 31st
July, 1836,
had under-
let the
whole of
the house
for which
he had been
registered,
except a
shop and
cellar worth
14*l.* per
annum, and
continued
to occupy
the shop
and cellar
till March
1837, when
he became
bankrupt.
His vote
was held
good.

Mr. D. Pollock.—Rice's bankruptcy in March 1837

(1) K. & O. 48.

1838. divested him of his whole property ; and Ensor, who up to that time had been a lodger, then became tenant to the mortgagee of the part of the house which he occupied. Rice then ceased to occupy anything but the shop and cellar ; and he is registered for the house, and not for the shop and cellar. When the shop was re-opened by Birch, he and Rice were in fact partners, Birch's weekly wages being merely a bonus for his management ; so that the occupation from that time was joint : and as the whole value of the shop and cellar was only 14*l.*, Rice's share was not sufficient to confer a vote.

Mr. Talbot.—Rice ceased to occupy the whole house in November 1835, when Ensor became tenant of all the premises, except the shop and cellar. From that time Rice had lost his qualification to vote, and the objection might have been taken to his vote before the revising barrister in 1836 ; and as it was not then taken, the Committee cannot now entertain it, unless they determine to open the register.

The point has been decided in *Draper's case*, Southampton ; (1) there the disqualification had occurred previous to the 31st July ; and the Committee decided that the objection, not having been taken before the revising barrister, could not be maintained. In the present case there had been a substantial change of residence in November 1835.—Vote held good.

DANIEL SNELL'S CASE.

Mr. D. Pollock proposed to take the two cases of this voter and John Chisnell together, but *Mr. Wrangham* objected to this course ; and the Chairman intimated that the cases must be taken separately.

This voter was in Class 4, corresponding to Class 1,

(1) P. & K. 231 ; C. & R. 122.

A tenant who holds the premises for which he was registered under a new tenancy, may

polled for Gibson and Kelly. Had occupied, as tenant, 1838.
the house for which he had been registered up to Michael-
mas 1836; had then removed from that house to another, vote in re-
spect of
such pre-
mises.
and had been succeeded by a fresh tenant. On the 6th
July, 1837, had removed back to the house for which he
had been registered; had taken it for a new term, and
continued to occupy it.

Mr. Wrangham.—The only question here is, whether
the voter could truly answer the third question in
2 Wm. IV. c. 45, s. 58; that is, taking the whole of
that question together, including the part in italics, had
he the qualification described in the register?

Mr. D. Pollock—When a party has once lost his
qualification, he cannot recover it again without being
re-registered.

It is admitted here, that if the election had taken
place at any time between Michaelmas 1836 and Mid-
summer 1837, he could not have answered the third
question, and could not have voted. If he had been
objected to before the revising barrister at the revision
subsequent to the election, he must have been struck
off; if he had applied to have been re-registered to
such revising barrister, he must have been rejected.—
Vote held good. (1)

When the votes objected to on the ground of re-
moval after registration had been disposed of, it was No attempt
made to
open the
register.
agreed between the counsel on both sides, that no
question should be raised affecting the opening of the
register.

The classes objected to on the ground of under
value were then gone into. Proof was given in each
case that the objection had been taken before the revis-
ing barrister, but the evidence was not confined to that
which had been given at the revision.

(1) This is a new decision, and one which appears to us important.

1838.

Practice of
revising
barrister to
view pre-
mises in
cases of
doubtful
value.

The revising barrister had, in many cases where the case had appeared to him doubtful, gone himself and viewed the premises, and scarcely a single instance occurred in which the revising barrister's decision was over-ruled where he had viewed the premises, or where the real facts of the case appeared to have been before him.

THOMAS JOHNSON'S CASE.

A voter was
locked up
at an inn,
for two
nights and
a day pre-
vious to the
election,
and was
supplied
gratis
whilst there
with meat,
drink,
lodging,
and enter-
tainment,
up to the
time of his
voting, but
these acts
were not
traced to
the candi-
dates; the
Committee
held the
vote good.

He polled for Gibson and Kelly; was objected to under Class 2, as having received meat, drink, and entertainment, or tickets for meat, drink, and entertainment, for voting at the election. The waiter of the Waggon and Horses Inn, Ipswich, proved that the great gate, which was usually open, and through which carts came to the inn, was padlocked during the day preceding the election; that a wicket in this gate was also locked, and the key kept by Mr. Green, the publican, so that no one could get out of the inn except by Mr. Green's permission; that Johnson was brought into this inn drunk on Monday night, two days previous to the election, by a butcher of the name of Smith, and another man; that he slept at the inn, and had breakfast taken to him in his bed-room the next morning; that during the Tuesday morning several voters in the interest of Gibson and Kelly were brought into the club-room, by two butchers of the names of Gladding and Osborne, and a bricklayer of the name of Lawrance, and breakfasted there; that whilst they were at breakfast, Johnson came down to the club-room; that after breakfast the club-room door was locked, and the key kept during the day by Gladding and Osborne alternately; that other persons were let into the club-room during the day; that the people in the club-room were served with spirits and beer, and

whatever they chose to call for; they were also served with a cold round of beef for luncheon. There was a little wicket in the club-room door, through which part of the liquor was handed into the room; for part of it Gladding unlocked the door, and it was carried in. The drinking went on all day: they all gradually got drunk. In the course of the day they were served with a roasted leg of mutton for dinner, of which Johnson partook; after dinner the drinking recommenced, and continued all night; at length, after a variety of scenes of profligacy too gross to be described, Johnson went to bed drunk, and voted on Wednesday morning for Gibson and Kelly. The regular course of business in the house was for customers to pay for liquor as it was taken to them; on this occasion no money passed. The waiter did not ask for money, his master having told him he need not do so. Gladding proved that he was of the blue party at Ipswich, and went to the Waggon and Horses at Ipswich, at about half-past eight in the morning before the election: saw Johnson in bed tipsy; Johnson had some mutton chops for breakfast about nine in the morning. There were seven other voters in the club-room during the day; he and Osborne were not voters. The other voters had their breakfast in the club-room; there was rum on the table; he had not heard any one order it. Whatever was ordered was brought up; witness paid for nothing. The landlord came up before dinner, and said dinner was coming up, and it was only for the voters, and Gladding and Osborne. When any of the voters went out of the room, Gladding or Osborne went with them to bring them back again. Sometimes Gladding and sometimes Osborne kept the door. About nine o'clock in the evening two active and influential gentlemen of the blue party went to the Waggon and Horses, and dis-

1838 charged Gladding and Osborne, who were then drunk, and whose places were supplied by two other men: Gladding was then sent to watch the stairs, which he did.

Jonathan Matt proved that he staid at the Waggon and Horses from seven in the evening, on Tuesday. to six next morning, drinking with Johnson and other voters for Gibson and Kelly, and that he saw Gladding there.

Mr. Austin.—The Committee is called on to decide whether treating at an election is or is not bribery. The principle for which he would contend was, that if a voter received a sum of money, or any other gift, for the purpose of giving his vote to one of the candidates, and in consequence of that gift did give his vote, such voter was bribed, and his vote must be struck off, without any proof being requisite to show that the bribe came from the sitting member, or his paid agents. The Committee will have no inclination to refine and distinguish between one description of corruption and another: if they concede the principle that a vote is bad which is given in consequence of the corrupt influence of a sum of money received by the voter for such vote, and that the party assailing such vote is under no necessity of tracing the sum of money by which the voter was corrupted to the candidate, then they must strike off the vote of Johnson. The objection to the voter is, that he was kept drunk, and plied with liquor for two nights and a day before the poll, to induce him to give his vote, and that in consequence of this corrupt influence he did give his vote; and for such an abuse of his franchise the Committee are bound to deprive him of that vote. It is not pretended that the voter paid for anything which he had during that period; it is not pretended that the entertainment was given him for

any other purpose than to induce him to vote in the manner in which he did vote. There is no similarity between this case and the case of breakfasts on the morning of an election, or payment of travelling expenses for conveying voters to the poll. Even such gratuities are illegal when given by a candidate, *Bayntum v. Cattle*; (1) but the receipt of them does not vitiate a vote, unless the voter was corruptly induced to give his vote in consequence: but here the whole scene is inconsistent with any other interpretation than that of the bribe having been given on the one side, and received on the other, as the inducement to vote. The voters are placed under *surveillance*, not allowed to leave the house for an instant, except in the custody of one of the turnkeys, who were placed over them to watch them, and prevent their escape. This voluntary surrender of liberty is of itself conclusive of the corrupt compact under which the bribe was received.

The facts are, that the voter on Monday night and all Tuesday received entertainment in a public-house belonging to one of the parties; that he went up from that house and polled for the party which had corrupted him. Surely such a voter has been bribed. It is proved that the corrupting influence has been applied: how can any other inference be drawn than that the corrupting effect has been produced? If practices such as have here been proved are to be legalized—if Committees will permit voters hour after hour, and day after day, to commit every kind of disgusting excess and loathsome brutality with impunity, at the expense of the candidates or their partisans, every honest candidate must be driven out of the field. Unless the law has an arm long enough to reach such demoralizing effects, and to restrain them by a wholesome severity,

(1) 1 M. & R. 268.

1838. it would be better at once to legalize the sale of votes. He trusted that the Committee would not be misled by any reference to the Treating Act; it was not under that Act his objection was taken. That Act applied to treating by candidates; and if a candidate is declared by a Committee to have been guilty of treating, he is incapacitated from sitting again in the same Parliament.

The disqualification stood originally upon the ground of the common law, and is an inherent principle in the constitution. (1)

It is also an inherent principle of the constitution that a voter who has given his vote under a corrupt influence, shall have his vote struck off. (2) If the present voter had received money for his vote, there would be no question but that his vote was vitiated. Are the Committee then to be imposed upon by the mere equivocation of treating? The naked question is, was the gift of entertainment for the purpose of obtaining the vote, and did it produce that effect?

Mr. *Wrangham*, contra, was stopped by the Committee.—Vote held good. (3)

Mr. *Phillips* then stated that Mr. Wason had come to the resolution to withdraw the petition against Mr. Gibson. The petition of Tumner and others was accordingly withdrawn.

WILLIAM SHARMAN'S CASE.

The receipt
of paro-
chial relief
between
the 31st day

He had voted for Gibson and Kelly, and was objected to under Class 12, for having received parochial relief since registration and before election.

(1) Rogers, 5th edit. part i. 71.

(2) Simeon, 160, & seq.

(3) We have good reason to believe that the Committee were unanimous on this question, and that their decision did not at all arise from a disbelief of the statements of the witnesses. The decision, however, was complained of by Mr. Wason, in a petition to the House of Commons, presented by Mr. Aglionby, on the 27th February, 1838. See *infra*, p. 293, n.

Mr. Talbot.—We admit the receipt of parochial relief, as stated in the heading of the list, but contend that it forms no objection to the vote. 1838.

Before the Reform Act, a voter in a borough was disqualified by the receipt of parochial relief within twelve months prior to the election. The Reform Act, section 36, substituted the last day of July, instead of the election, as the period from which the twelve months were to be reckoned: the consequence is, that a voter cannot be registered if he has received parochial relief within twelve months prior to the last day of July, but when he is on the register, the receipt of parochial relief does not disqualify him.

of July and the period of election, is a disqualification to a voter.

If it were otherwise, it would be a hardship on the voter, as the period of disqualification would be materially extended, in many cases to twenty-four instead of twelve months. The Reform Act is for the extension of the franchise, and such an effect as is now contended for would be a limitation of it.

There is no similarity in the disqualification arising from bribery, and that from the receipt of parochial relief; for bribery is entirely a personal disqualification, the receipt of parochial relief is only a temporary suspension of the qualification. The receipt of parochial relief is to be inquired into by section 36 at the time of registration, and at that time only. The third question prescribed by section 58 does not affect this point. It can be no part of the voter's qualification, as a free-man, that he should have abstained from receiving alms subsequent to registration.

The receipt of alms has already been held not to be a disqualification, in the cases of *Bligh and Eastman*, 2nd *Canterbury*, (1) and in *Wade's case*, Ipswich; (2) and although a contrary decision was come to in the

(1) K. & O. 321, 2.

(2) 1b. 386.

ELECTION CASES.

It would be better at once to legalize the sale of votes. He trusted that the Committee would not be made any reference to the Treating Act; it was not that Act his objection was taken. That Act applied to treating by candidates; and if a candidate is convicted by a Committee to have been guilty of treating, he is incapacitated from sitting again in the same Parliament.

The disqualification stood originally upon the ground of the common law, and is an inherent principle in the constitution. (1)

It is also an inherent principle of the constitution that a voter who has given his vote under an undue influence, shall have his vote struck off. (2) The present voter had received money for his vote. It would be no question but that his vote was void. Are the Committee then to be imposed upon by mere equivocation of treating? The naked question was the gift of entertainment for the purpose of procuring the vote, and did it produce that effect?

Mr. *Wrangham*, contra, was stopped by the Committee.—Vote held good. (3)

Mr. *Phillips* then stated that Mr. Wason had moved the resolution to withdraw the petition of Mr. Gibson. The petition of Turner and others was accordingly withdrawn.

WILLIAM SHARMAN'S CASE

The receipt
of paro-
chial relief
between
the 31st day

He had voted for Gibson and Kelly, and was rejected to under Class 12, for having received relief since registration and before election.

(1) Rogers, 5th edit. part i. 71.

(2) §

(3) We have good reason to believe that the Committee was right on this question, and that their decision did not rest upon the statements of the witnesses. The decision, given by Mr. Wason, in a petition to the House of Commons by Mr. Aglionby, on the 27th February, 1838. See *the*



1838. *Bedford*, (1) the preponderance of cases is in favor of the validity of the vote.

Mr. Austin.—The defence in this case is, that if the voter can answer the third question, his vote is good. This test is fallacious, as will appear by applying it to other instances. A voter may have the same qualification as that for which he was registered, yet he may have become a custom-house officer, an exciseman, or may have received a bribe, in either of which cases his vote would be vitiated. There is great difference in the authority to be attached to the decisions of the various Committees: the *Bedford* is a case to which great weight is attached. To the 2nd *Canterbury* no weight whatever is due. That is the Committee which, in *Ellis's* case, decided (2) that the receipt of parochial relief between the 31st day of July and the period of election, is a disqualification to a voter; and in *Eastman's* case, (3) decided that the receipt of parochial relief between the 31st day of July and the period of election, is *not* a disqualification.

The law of Parliament is, that a person cannot vote who has received alms or parochial relief within a year before the election, (4) and the Reform Act has done nothing to alter the law in this respect.—Vote struck off.

STEPHEN ABBOTT NOTCUTT'S CASE.

The vote of
a deputy
mayor, held
bad.

Objected to under Class 9; voted for Tufnell and Wason; was appointed deputy mayor under 2 Wm. IV. c. 45, s. 71, and under that section was entitled to 2*l.* 2*s.* for his services. He had not, in fact, been paid; but the town-clerk had received 2*l.* 2*s.* from the candidates for the purpose of paying him.

Mr. Thesiger.—By 7 and 8 Geo. IV. c. 37, s. 1, if

(1) P. & K. 136.

(3) *Ib.* 322.

(2) K. & O. 316.

(4) *Simeon*, 88, 90.

any person shall, either during any election, or within six months previous to such election, or within fourteen days after it shall have been completed, be employed at such election as counsel, agent, attorney, poll-clerk, flagman, or in any other capacity, for the purposes of such election, and shall at any time either before, during, or after such election, accept or take from any such candidate or candidates, or from any other person whatsoever, for or in consideration of, or with reference to such employment, any sum or sums of money, retaining fee, office, place, or employment, or any promise or any security for any sum or sums of money, retaining fee, office, place, or employment, such person shall be deemed incapable of voting at such election, and his vote, if given, shall be utterly void, and of none effect. 1838.

In Secker's case, New Windsor, (1) the vote of a town-clerk, who had been paid for his services, was held bad. The argument on which the vote was attempted to be supported in that case was, that where in a Statute several classes were enumerated, beginning with the highest and ending with the lowest, and such enumeration is followed by words of general reference, those general words must be considered as *ejusdem generis* with the last enumerated class. If that argument were applicable, no person who acted in a higher capacity than flagman would be incapacitated, unless he came within the classes expressly enumerated. But the authority (2) there cited, only applies to cases in which there is a particular rank or profession, comprehending within it definite gradations. It is clear that such an explanation is not applicable to the Statute under consideration; for on referring to section 6, it will be found, that no person having a right to vote can be compelled to serve as special constable

(1) K. & O. 185. (2) Archbishop of Canterbury's case, 2 Co. Rep. 46.

1838. during the election, unless he shall consent to act, which clause serves materially to explain the meaning of the Act. It may be contended, that the deputy mayor cannot be within the meaning of the 7 and 8 Geo. IV. c. 37, s. 1, on the ground that no such officer existed at the time of passing that Act, the office having been created by 2 Wm. IV. c. 45, s. 71; but this argument is untenable, for the present poll-clerks owe the origin of their office to 2 Wm. IV. c. 45, s. 68; and poll-clerks are expressly enumerated in 7 and 8 Geo. IV. c. 37, s. 1; so that the present poll-clerks would be incapacitated, although their office was not in existence at the time of passing 7 and 8 Geo. IV. c. 37, s. 1. An attempt might indeed be made to exempt poll-clerks from the operation of 7 and 8 Geo. IV. c. 37, on the ground that check-clerks only were meant by that Statute; but on referring to 9 Geo. IV. c. 59, s. 1, we find that the distinction between poll-clerks and check-clerks was then recognized and established; for it is there provided, that each compartment shall have accommodation for a poll-clerk, agent, and check-clerk, for each candidate.

The principle of 7 and 8 Geo. IV. c. 37, is not merely to exclude persons employed by the candidates; for where the voter was employed on one side, and voted on the other, his vote was struck off; Wilcox's case, Bedford. (1) The object of the Act is to exclude all persons who derive a lucrative employment from the election. He also cited William Long's case, New Windsor. (2)

Mr. *D. Pollock*.—The cases on one side have been produced, those on the other have been withheld, the effect of which will be to give the reply to the objector. Can it be seriously contended that the Reform

(1) C. & R. 94; P. & K. 136.

(2) K. & O. 175.

Acts intended the disfranchisement of those additional officers, whose appointment is rendered necessary by the limitation of the duration of an election to a single day? 1838.

The deputy mayor is a statutable officer, appointed under the Reform Act, paid a statutable salary by the mayor, by whom he is appointed, without being in any way dependant on the candidates.

He denied that poll-clerks, appointed under 2 Wm. IV. c. 45, s. 68, would be incapacitated from voting. The present office of poll-clerk was not contemplated at the passing of 7 and 8 Geo. IV. c. 37; it was only intended to apply to the check-clerks, who at that time conducted the business at elections. Even if this is not conceded, still it would be inconsistent with the provisions of 2 Wm. IV. c. 45, that poll-clerks appointed under that Act should be incapacitated from voting; and rather than allow such an effect to be produced, the Committee would be bound to treat the latter enactment as a repeal *pro tanto* of the former. The principle, that where there are two inconsistent enactments the latter must prevail, has been carried so far, that wherever the same Act contains two inconsistent provisions, the latter always prevails.

Secker's case, New Windsor, (1) differed in many essential particulars from the present. He was town-clerk, and as such had no official duty at elections; and although partly employed for the purposes of the election, he charged for other matters, which he was not warranted to do. There might be great danger in allowing a town-clerk to make an arbitrary charge of 21l. for the part which he takes in an election; but no one would feel any alarm at the pittance of 2l. 2s., which the Statute expressly allows to the deputy mayor.

(1) K. & O. 185.

1838. Wilcox's case, Bedford, is quite inapplicable to the present question; for there the voter was a check-clerk, employed by one of the candidates, and clearly within the mischief of the Statute. The attempt has often been made, since the passing of the Reform Act, to strain the meaning of 7 and 8 Geo. IV. c. 37, s. 1, for the purpose of extending it to classes to which it does not properly apply, but the attempt has hitherto failed. In Page's case, Ipswich, (1) a voter who had been employed to build the hustings was objected to, but the vote was held good. In the cases of Howard and others, Ipswich, (2), the votes of six persons employed during the election to keep the place were held good. In the New Windsor, in Lovegrove's case, (3) and Morton's case, (4) the votes of all the town constables were held good. In Samuel Barnes's case, Worcester, (5) the votes of the serjeants at mace, who were paid for their attendance at the election, were held good. There is no case in the books subsequent to the Reform Act in which the vote of a deputy returning officer has been questioned, except in the Dublin, and there it was held good; Edward Stanley's case, Dublin. (6)

Mr. *Thesiger*, in reply, referred to the minutes of the Dublin case, and explained that the decision come to on Stanley's vote, was on the ground that the objection to the vote was that he was a paid agent, whereas the evidence showed him to have been deputy sheriff, and therefore he did not come within the heads of the lists of objection. (7) Page's case is inapplicable, for he

(1) K. & O. 387.

(2) 1b. 384.

(3) 1b. 180.

(4) 1b. 183.

(5) 1b. 247.

(6) Since reported, *supra*, 201.

(7) It will appear, from a reference to the report of the case, *supra*, page 201, that the objection did not in fact turn on the heading of the list, but on the question whether a deputy sheriff came within the meaning of 7 and 8 Geo. IV. c. 37.

was merely employed by the mayor in the way of his trade. Howard and others, whose votes were retained in the last Ipswich case, were engaged in the ordinary routine of their employment, and not for the purposes of the election. Samuel Barnes, in the Worcester case, was a town constable, bound to keep the peace, and not employed expressly for the purposes of the election. Lovegrove, in the New Windsor case, had refused to be paid for his services, which distinguishes that case from the present. The only case expressly in point is Secker's case, in the New Windsor, which is a decided authority against Notcutt's vote.—Vote struck off. (1)

CHARLES LEWIS ROBINSON'S CASE.

He voted for Gibson and Kelly, and was objected to under Class 9. In defending this vote, Mr. *Thesiger* produced an unstamped agreement for a lease between the voter and his landlord.

Occupation as tenant commences when possession is formally delivered.

Mr. *Austin* objected to the admissibility of the document without a stamp.

Mr. *Thesiger* applied for an adjournment, to enable him to have a stamp affixed.

Adjournment allowed to give time for stamping an instrument, objected to for want of a stamp.

Mr. *Austin* opposed the adjournment, and Mr. *Thesiger* replied; and, after the question of adjournment had been argued, the Committee—

Resolved—"That if Mr. *Austin* perseveres in his objection to the instrument in its present form, time be allowed Mr. *Thesiger* to get it stamped."

Mr. *Austin* then withdrew the objection.

The facts were, that the voter had succeeded one Capon in a public-house, for which he was registered, in the summer of 1835. Capon left the premises during

(1) See *infra*, p. 293, n.

1838. July, and the voter at once agreed with the landlord to take the premises, and pay rent from the preceding Midsummer; and some beer was put into the house by the landlord, who was a brewer, on the voter's account, on the 28th July, but possession was not formally delivered to the voter till the 3rd August, 1835.—Vote struck off.

Committee will not rigidly bind a party to conduct his case in the order which he has notified to his opponent.

Mr. *Austin* then proposed to proceed with Class 10, reserving to himself the right to return to Class 9.

Mr. *Wrangham* objected to this course; and read the notice which he had received the day before, which was, that his opponents would proceed with Class 9, and then with 8, 10, and 11, but would not bind themselves to take them consecutively.

Chairman.—We cannot interfere to put a construction on a notice, ambiguously worded, passing between the parties for mutual convenience.

Mr. *Austin* then proceeded with Class 10.

ELEAZAR LAWRENCE'S CASE.

The vote of a deputy mayor held bad, although subsequently the election he had refused to receive his salary.

Objected to under Class 9; voted for Tufnell and Wason. The facts were the same as in Notcutt's case, except that Lawrence had, subsequently to the petition, refused to receive the money from the town-clerk, although the town-clerk had received it from the candidates for him.

Mr. *Thesiger* contended, that this case was precisely the same as Notcutt's; that Lawrence had undertaken the services for the usual remuneration, and might now sue for the sum due to him.

Mr. *Austin* relied on the repudiation of payment by Lawrence.—Vote struck off. (1)

(1) See *infra*, p. 293, n.

1838.

JOSEPH BEARD'S CASE.

Objected to under Class 9; voted for Tufnell and Wason. It was proved, that at a meeting of the candidates, it had been suggested that the ordinary peace officers were not sufficient; and in consequence of a suggestion of Mr. Kelly's friends, it had been agreed that the parish constables should be called out. This was accordingly done; and Beard and other parish constables were employed to keep the peace during the election, at 7s. a day, which was paid to them.

The vote of a constable employed to keep the peace during the election, held bad.

The argument in this case was similar to that in Notcutt's.

Mr. *Thesiger* contended, that the case came within 7 and 8 Geo. IV. c. 37; and relied on section 5, excepting voters from serving the office of special constables.

Mr. *Austin* cited the cases already referred to in Notcutt's case; and observed, that it was a strong circumstance that the parties who now raised this objection had themselves suggested the course, in consequence of which they sought to disqualify the voters. In deciding a question of this kind, the intention of the Legislature should be looked at, and not the mere words. In what part of the election do the constables interfere? It cannot be said that keeping the peace is acting for the purposes of the election; neither upon the common construction of words, nor on the intention, are constables within the Statute. Where will be the limit, if such a construction is to prevail? The coachman of the mayor, who drives him to the election, might be objected to on the same ground. If the constables are to be disqualified, how is the peace to be kept at elections?—Vote struck off. (1)

(1) On Tuesday, 27th February, 1838, Mr. Aglionby presented a petition from Mr. Wason to the House of Commons, complaining of the four deci-

1838. Upon this decision being given, Mr. Tufnell abandoned the further defence of his seat.

February 26, 1838. The House was informed, that the Committee had determined—

That Thomas Gibson, esquire, is duly elected a burgess to serve in this present Parliament for the borough of Ipswich.

That Henry Tufnell, esquire, is not duly elected a burgess to serve in the present Parliament for the borough of Ipswich.

That Fitzroy Kelly, esquire, is duly elected, and ought to have been returned a burgess to serve in the present Parliament for the said borough.

That the petition of John Cobbold, and others, did not appear to the Committee to be frivolous or vexatious.

That the opposition to the said petition did not appear to the Committee to be frivolous or vexatious.

That the petition of James Turner, and others, did not appear to the Committee to be frivolous or vexatious.

That the opposition to the said petition did not appear to the Committee to be frivolous or vexatious.

That the Committee have altered the poll taken at such election, by striking off James Dothie (forty-one other voters named), as not having had a right to vote at such election.

sions of this Committee on the cases of Johnson, Notcutt, Lawrance, and Beard, and praying that the House would take steps to prevent those decisions from being hereafter acted on as precedents. On the presentation of this petition a debate ensued principally on the decision in Beard's case; in the course of which

Sir R. Heron distinctly stated, that he did not wish to impugn the decision come to on the occasion alluded to. He had voted in the minority; but the question was exceedingly difficult to decide, and he was by no means satisfied that he gave the vote in the way it should be given.

TAUNTON.

The Committee were chosen on the 27th of February, 1838, and consisted of the following Members:

Hon. Robert H. Clive (Chairman) *Shropshire.*

Robert H. Hurst, Esq.

Hersham.

T. P. Williams, Esq.

Great Marlow.

R. Price, Esq.

Radnor.

E. Litton, Esq.

Coleraine.

Robert Williams, Esq.

Dorchester.

Hon. G. H. Cavendish,

Derbyshire.

Sir Charles R. Blunt, Bart.

Lewes.

Sir C. Brooke Vere, Bart.

Suffolk.

W. B. Wrightson, Esq.

Northallerton.

Robert Palmer, Esq.

Berkshire.

Petitioners—

H. Pitman and others, Electors in the interest of R. Newton Lee, Esq.

Counsel—Mr. Bere and Mr. Austin.

Agent—Mr. Wm. Stephens.

Sitting Member—E. T. Bainbridge, Esq.

Counsel—Mr. Cockburn and Mr. Kinglake.

Agents—Messrs. Forbes, Hale, and Boys.

Mr. Bere opened a case of scrutiny for the petitioners.

The numbers at the close of the poll were, for

Labouchere . . . 460

Bainbridge . . . 414

R. N. Lee . . . 409

THOMAS LONDON'S CASE.

Voted for Labouchere and Bainbridge, No. 287 on the Register and the same number on the poll. The voter was objected to on the ground that the person whose name was on the register did not vote but was personated.

Daniel London was called and proved that he had a

A vote was objected to on the ground of personation, but the person who voted was proved to have had a right to

1838.

be on the register, and the Committee presumed, in the absence of any decisive evidence to the contrary, that a mistake had been made in the Christian name in the entry in the register on which he voted, and held the vote good.

sufficient qualification to entitle him to vote ; had been a voter for many years, that he had gone to Mr. Bainbridge's Committee room and obtained the No. 287, which he had taken to the poll and on which he had voted ; that he had a son named Thomas, and a brother named Thomas, but that neither of them had voted at the election, that his son had been registered as a potwaller in former years, and had voted at former elections ; that his son lived partly at Bath and partly at Taunton ; that during part of the year 1837 he had lived with witness, and that he was at Bath at the time of the election. Witness went to the poll and stated his number ; the officer turned to it and said " Thomas London," Witness said, " my name is Daniel ; it is a mistake." Witness then voted.

Mr. *Cockburn* contended on this evidence that the case against the vote was not sufficiently made out, as the most probable explanation of the case, as it had been left by the petitioner, was that Daniel London who voted was the person who was intended to be on the register, and the christian name of Thomas was entered there instead of Daniel by mistake : that it was clear upon the evidence adduced, that Daniel London was the party entitled to vote, and that Thomas the son of Daniel had no right to vote as it appeared that he had during the year 1837 lived with his father. Therefore, the right of Daniel to be on the register, coupled with the fact that Daniel had been a voter for years, without any attempt on the part of the petitioners to prove any change of qualification, or any circumstances which would have warranted his exclusion from the register, and also coupled with the further fact that Thomas, the son, had not been proved to have had any qualification such as he was apparently entered for ; necessarily led to the conclusion that the insertion of Thomas was a mere error in the christian name, and that the entry did not in fact refer to any one but Daniel.

Mr. Austin against the vote contended that the evidence of personation was too clear to admit of doubt.

1838.

Resolved.—That the vote No. 287, is a good vote and that the person who had a right to vote was Daniel London.

JOHN MORGAN'S CASE.

Registered for house and garden, East Reach, voted for Bainbridge, objected to for change of qualification.

Mere tenancy without occupation, held not sufficient to entitle a party to vote.

The voter was a yearly tenant from Midsummer to Midsummer of the house for which he was registered; on the 25th March, 1837, he had given notice to quit. A few days before Midsummer 1837, he had called on his landlady and tendered her the keys, which she refused to accept, because he had not given a proper notice to quit. The key was left at the landlady's house but she was not aware of it at the time. It was also shewn ~~that~~ about a fortnight after Midsummer the landlady's husband had written the words "to be let" upon the door of the house. The landlady had instituted proceedings to recover rent. She had given instructions for the recovery of the whole rent up to Christmas, but the quarter's rent to Midsummer remained unpaid, and although the suit had been commenced no particulars had been delivered. The voter removed from the house before Midsummer, which was shut up from that time until and after the election. The landlady took possession of the house some time after the election, but did not give up her claim to the rent from the voter on account of his having quitted without giving her notice.

Mr. Bere. The Reform Act, section 27, confers the franchise on every person who shall occupy as owner or tenant any house, &c., of the value of 10*l*. To entitle a person

1838. to be registered as a voter he must have occupied the premises for which he claims to be inserted on the register. To enable a person to vote, it is necessary, by sec. 58, that he should continue to have the *same qualification*, for which he so registered up to the time of the election. Occupation is, therefore, a necessary ingredient of the franchise. It is not enough for a voter to stand in the relation of tenant to premises, there must be an occupation in fact. *Prentice's case*, (1) *Ipswich*, shews that a constructive occupation is not sufficient. Moreover, here the tenancy had been repudiated by the voter.

Mr. Cockburn. Occupation as tenant, is all that the Reform Act requires, and, if a person stands in the relation of tenant to the premises, is liable to rent for them, and has not parted with the possession, he is, in law, the only occupier, and cannot be deprived of his franchise. There is here no cesser of occupation, the voter has continued the legal tenant of the premises, and there is no ground for the assertion that personal occupation is necessary. In *Hood's case*, *Kingston-upon-Hull*, (2) it was decided that so long as the incidents of tenancy continue, and the tenant is entitled to occupy, he may vote in respect of his tenement.

The voter here would have been liable for rent in an action for use and occupation. In such an action, proof of actual occupation is not necessary, (3) which shews that during the existence of the tenancy the voter was in the legal occupation of the premises. There was no surrender of the term. To constitute a surrender by operation of law, the only surrender which can be surmised in

(1) *Supra*, 273.

(2) K. & O. 428. But see the case of *Thomas Jarrett*, K. & O. 430, decided by the same Committee on the following day.

(3) 2 Stark. on Ev. 853.

this case, it is not enough that the tenant should give up the demised premises, there must be an acceptance of the possession by the landlord. (1)

1838.

Vote held bad.

JOHN WHITE'S CASE.

Registered as a potwaller. Stood on the poll as having voted for Labouchere and Lee, had originally been entered for Bainbridge and Lee. A vote once recorded cannot be altered.

Mr. *Cockburn* applied to have the former entry of Bainbridge and Lee restored.

It was proved that the voter came to the poll, and said he voted for Bainbridge and Lee, which the poll-clerk entered accordingly. The voter then turned from the table as if going away, but suddenly turned round towards the table again and said, "I beg pardon, I meant Labouchere and Lee." The poll-clerk said to him that he had recorded the vote for Bainbridge and Lee, but they both went to the returning officer who ordered the entry to be altered into "Labouchere and Lee."

The voter was perfectly sober, and he corrected himself immediately after the name had been entered. No one had spoken to him to induce him to correct himself. And the correction followed so close on the mistake, as not to have allowed sufficient time for writing the names of both candidates at length provided that had been necessary for the purpose of recording the vote.

Mr. *Cockburn* contended that although a voter would not be allowed to sustain an injury by reason of the negligence or mistake of an officer, yet that if a vote be once recorded by the act, and according to the expressed will of the voter himself, it could not be altered upon any subse-

(1) See *Grimman v. Legge*, 8 B. & C. 324.

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quent explanation of a mistake. Such a course would be most dangerous to the due exercise of the franchise. It would be a most exorbitant power vested in the returning officer, if he, at the suggestion of voters, were authorized to rectify supposed mistakes after the will of the voter had been freely and openly declared and recorded; and it would be an impolitic course to enable a voter, under any circumstances, to change the avowed declaration of his vote. *Llewellyn's case in Monmouth*, (1) is a direct authority on this subject. The principle of not admitting any correction of the poll is adverted to in Rogers, 212.

Mr. *Bere* contended that a mere casual mistake such as the present, ought not to deprive the voter of exercising his franchise according to his wishes. The correction of the mistake followed so closely on the giving the vote, that it was but one proceeding and the whole ought to be taken together as constituting the declaration of the voter.

Resolved.—That the vote of John White should be entered for Mr. Bainbridge.

ROBERT SAVARY'S CASE.

Party impugning vote must prove insufficiency of value.

Registered for a house and iron-foundry, voted for Bainbridge, objected to for change of occupation.

It was admitted on both sides that the voter had parted with the house, subsequent to the registration and before the election, but retained the foundry at the time of the election; the only question raised in the case was, whether as the franchise as it appeared on the register, had been shewn no longer to exist, it lay on the party attacking or supporting the vote to prove the value of the remaining part of the qualification.

The Chairman stated, that where a party impugns a

(1) K. & O. 413.

vote and proves that the voter has parted with a part of his qualification described in the register, the onus of proving that the value of the remainder is not sufficient lies on the party objecting to the vote.

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Resolved.—That the party impugning the vote shall prove the insufficiency of the value.

Vote held good.

THOMAS BOYLE HARWELL'S CASE.

Registered as a potwaller and a 10*l.* householder, voted for Bainbridge, objected to under two heads; 1st, For having changed his occupation as a 10*l.* householder; 2d, For having left the borough, and thus ceased to be qualified as a potwaller: reference was made on the poll to both entries on the register.

Vote registered in respect of two rights, objected to on both accounts, and not proved to be disqualified on both was retained.

The voter was proved to have gone into lodgings with his wife and family at a short distance from Taunton, and out of the limits of the old borough for about a month in June and July, 1837, that during some part of that time he went forwards and backwards to his shop, going in the morning and returning in the evening; that the voter took some furniture with him to his lodgings, and said he had let his house in Taunton and sold the rest of his furniture. It was also proved that he went from the above-mentioned lodgings to others, within the old borough, where he continued up to and after the time of the election.

A witness stated that it was the custom of the borough of Taunton, for a person to boil his own pot at his own fire in order to make him a potwaller. As the custom was in dispute, the Committee at its adjournment required the counsel on both sides to deliver in at the next meeting of the Committee, written statements of the right of voting in Taunton before the passing of the Reform Bill, on

which each party intended to rely and which they would be prepared to support by evidence.

At the next meeting of the Committee, the parties were not prepared with such written statements, and the case was argued on the evidence as it stood.

Mr. *Bere* contended, that the voter had lost his right as a potwaller, by having left the borough of Taunton for such a time before the election as deprived him of the right to vote. That residence within the ancient borough was an essential part of the qualification of a potwaller, and that if he ceased to reside, he parted with his qualification.

Mr. *Kinglake*.—There is no proof that the voter had lost his right to vote as a potwaller. The petitioners are bound to make out a clear case of disqualification, and every presumption will be made in favor of a voter who has been registered, and exercised his right of voting at the poll. It ought to have been shewn, that Harwell had ceased to be a potwaller at some time within six months before the election. The absence of the voter in the way stated, was no evidence that he did not intend to return, and a temporary absence could not disqualify a voter. Moreover, there is no proof here, that in point of fact, the voter had not at the time of his sleeping out of the borough a sufficient occupation of his premises within the borough to constitute him a potwaller. His sleeping out of the borough would not necessarily destroy such a right. 2dly, As the voter has been objected to on the double ground of having changed his occupation, as well as having removed as a potwaller, and as there is no evidence given of his change of occupation the vote must be retained on that ground.

Vote held good.

1838.

WILLIAM NEWTON'S CASE.

Registered No. 326, potwaller, North-street, and No. 757, dwelling-house, Mount-terrace. He voted for Mr. Bainbridge, and appeared on the poll $\frac{326}{757}$. Was objected to for loss of both qualifications. He was proved to have been in partnership with Mr. Richmond in March, 1836, when he left the house in North-street, where the partnership business was carried on and went to live in Mount-street. In May, 1836, the partnership was dissolved. At Lady-day, 1837, the voter left the house in Mount-street, and was succeeded by a new tenant; at the time of the election, he was living in the house of his former partner as one of his family.

No objection will be entertained by Committee which might have been taken before revising barrister.

Mr. Bore.—The question is, whether the voter is disqualified as a potwaller. It must be conceded on the other side, that he had ceased to occupy the house for which he was registered as an occupier between the time of registration and the election. The point here arises, whether the Committee will enter into the discussion of a vote, as to any objection which existed prior to the time of the registration, and which was not taken before the revising barrister. The majority of Committees have certainly held themselves precluded from entering upon such matters. But the present case does not fall within the rule. There is a clear distinction in the language of the Reform Act as to rights first established by that Act, and as to ancient reserved rights. The section 27, which relates to the new franchise provides, that no person shall be registered as an occupier, unless he fulfil certain conditions therein named. The 33d section, which relates to reserved rights, provides that the person shall retain the right of voting so long as he shall be qualified as an elector, according to the usages of the borough. Although, there-

1838. fore, the 27th section refers to the time of registration as the time when the requisite conditions were to be complete, yet section 33, which reserves the right of voting so long as the qualification continues to exist, must have reference to the time of polling. If this view be correct, the objection can now be entered into, for the voter did not retain the right of voting at the time of polling, and the objection now raised could not have been gone into before the revising barrister. The objection arises on the want of continuance of the reserved franchise, as required by section 33. See *Wilkinson's case, Rochester*. (1)

Mr. Cockburn.—There is no such distinction as that alluded to between rights conferred by the Reform Act and rights reserved. The 33d section merely shows that the right of voting is to continue as long as the elector shall be qualified according to the usage, and then further provides that the voter shall be entitled to vote, if duly registered.

So that the title to vote depends on his being duly registered, and then the register is conclusive as to his right, unless the discussion of it can be re-opened before the Committee. The principle laid down, that objections existing at the time of registration, and not taken, cannot be taken before a Committee is now undisputed, and applies to all classes of registered votes, *Adam's case, Monmouth*. (2) Here the objection might have been taken before the barrister. In the year 1836 the objection as to the cesser of partnership existed. It was not necessary that the voter should have ceased to be a potwaller for six months prior to the last day of July, to enable the objection to be taken before the barrister. (3) It was a simple case of non-qualification. *H. Lawson's case, New Wind-*

(1) K. & O. 107.

(2) K. & O. 416.

(3) 26 Geo. 3, c. 100, s. 1.

sor, (1) *Collin's case, Rochester*, (2) and *Hall's case, Monmouth*. (3)

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The *Chairman*.—If the objection could have been effectually taken before the revising barrister it ought then to have been taken.

Vote held good.

JAMES PRING'S CASE.

Mr. *Bere* proposed to have the name of this voter placed on the poll for Mr. Lee, on the ground that he had tendered his vote for him at the election.

It was proved that the voter had been asked the three questions, that he had demurred to the third question and refused to answer it, saying that "he could not do so," it being proposed to him in the terms directed by the Reform Act, and that he had afterwards gone to the returning officer and offered to answer the third question in the affirmative, saying that at first he had misunderstood the word "originally;" the returning officer refused to receive the answer, whereupon the voter tendered his vote for Mr. Lee, and was rejected.

A voter having in the first place refused to answer the third question, afterwards offered to do so, but was refused by returning officer. Vote held good.

Mr. *Bere*.—The case of *Cullen v. Morris* (4) is an express authority to show that a party may tender his vote again and again at the poll, and is not precluded from so doing by reason of having been once rejected. The opinion of Abbott, C. J., is decisive as to this point. There the voter in the first instance tendered his vote to the poll-clerk, who objected to receive it. A few days after the voter again tendered his vote, and the case determined that the voter was entitled to vote. The language of the Judge is, that the voter "had that right, at all events, upon his second application and tender of his vote."

(1) K. & O. 152, 160. (2) K. & O. 121. (3) K. & O. 416.

(4) Corbett & Dan. 121, 122. Starkie, 577.

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This case is analagous, and the voter had a right to offer himself a second time, in order to answer the questions, although he had previously refused to do so. (1)

He also relied on the words of the 58th section of the Reform Bill, which exclude persons from voting only when they refuse to take the oath, which oath has no reference to a previous tender of the vote, and also that under the words of that section the returning officer had no right to ask the voter if he had previously been rejected, as the section limits his questions to three, and allows no others, and the protection against a second vote was secured by the second question. This, therefore, was a mistake of the returning officer, which the Committee would correct. *New Sarum case.* (2)

He cited and distinguished *Harris's case, Droitwich*, (3) on the ground that the party never did, in reality, tender his vote a second time, and the decision of the Committee is grounded entirely upon the fact that he meant to avoid voting altogether.

He also cited the *Bridgewater case*, (4) and the *Gloucester case*. (5)

Mr. Kinglake.—The case of *Cullen v. Morris* has no reference whatever to the present question. The decision of Abbott, C. J., as to the validity of the vote was not given on the supposed ground of a second tender by the voter being allowable, nor was his attention in any way called to the point. The only matter decided in that case was, that a scot and lot voter is entitled to vote, although his poor's rates are in arrear, if no personal demand of the rates has been made on him, and, at all events, if he pays the rates during the election—it, therefore, is wholly inapplicable in this instance.

(1) *New Sarum*, P. & K. 257.

(4) 1 Peck. 108.

(2) P. & K. 257.

(5) P. & K. 126.

(3) K. & O. 54.

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The voter here is required by the Reform Act, preparatory to the exercise of his franchise, to answer, if called on so to do, certain specified questions. The returning officer has no power to mould these questions according to any seeming exigency of a particular case; he must use the form prescribed, and if a voter by his own act, and not through any fault or wrong of the officer, wilfully refuses to answer such questions, he cannot withdraw, and subsequently demand that they should be repeated to him. Upon the refusal, the officer is *functus officio* as it regards the party refusing. The language of the Act, section 58, which regulates the proceedings, and upon a construction of which this case must be decided, is express in its terms, it enacts that the returning officer shall, if required, put to any voter at the time of his tendering his vote, and *not afterwards*, the following questions, &c.

Here the duty of the officer is defined. He is to put the questions at the time of tender and not afterwards. The voter here tendered his vote, and the officer was not empowered to put the questions at any subsequent period. The same section shows, that if, upon putting the questions it shall appear to the returning officer that the voter has not the same qualification, for which his name was originally inserted in the register, he shall be excluded from voting at the election. Here, on putting the question, the returning officer receives an unsatisfactory answer, and the voter was thereby excluded from voting.

In the *Sarum case*, the ground of the decision was, that the answer was a sufficient one. In *Harris's case, Droitwich*, (1) where a voter had refused to answer the third question, and on the second day was brought up again, and rejected on the ground that he had been rejected the day before, it does not seem to have been contended that the tender of his vote on the second occasion after his

(1) K. & O. 54.

1832. refusal to answer the question, and rejection on the first day, was a valid tender.

Resolved.—That the vote of James Pring be placed on the poll of Mr. Lee.

SAMUEL CURRY'S CASE.

The term
"brick-yard"
a sufficient de-
scription of a
voter's qualifi-
cation.

He had been registered in 1835 for a dwelling-house, East Reach, and brick-yard, Holway-lane. Voted for Bainbridge, objected to as having lost part of his qualification, and not having, at the time of registration, a sufficient part to entitle him to vote.

In the course of the discussion of this vote, it became necessary to inquire into the registration in 1837, but neither party being prepared to produce the register, the Committee received the original lists, signed by the Barrister. The house in East Reach, and the brick-yard, belonged to the same landlord. The voter had left the house in East Reach between Michaelmas and Christmas 1836, and gone to live in a house adjoining the brick-yard, and rented with it; it was also proved by witnesses in support of the vote, that the brick-yard in Holway-lane contained buildings, and was worth more than 10*l.* per annum.

Mr. Bere.—The 27th section confers the franchise on persons who shall occupy any house, warehouse, counting-house, shop, or other building, &c., being, either separately or jointly with any land, of the clear yearly value of 10*l.* The schedule of forms sets out the nature of the qualification, as required by section 27. Here the entry is house and brick-yard, the house was not, at the time of the election, in the occupation of the voter, and his right depends on the qualification given by the brick yard. The term brick-yard is not one of the subject matters of occupation described by the 27th section. The entry should

have been buildings and land, brick-yard does not necessarily mean building and land.

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Mr. Kinglake.—The words brick-yard, as a descriptive term, are the best and most intelligible which could be used. A brick-yard *ex vi termini*, means the buildings and premises used in the manufacture of bricks. Besides, section 79 provides that no inaccurate description of any place, in any list or register, shall prevent the operation of the Act, provided such place be so designated as to be commonly understood.

Vote held good.

Both parties then handed in their statements of the custom as to potwallers in the borough of Taunton.

Custom of pot-walling.

The sitting member's statement was as follows:—

“The right of election, according to the ancient usage of the borough of Taunton, is in the inhabitants within the said borough, being potwallers, not having received alms or charity within a year before the election, the right was so affirmed by a Committee of the House on the 15th day of July, 1715, 18th volume of the Journals, page 241, col. 2, and is therefore conclusive as to the right.

“The potwaller must also be settled within the parish of Saint Mary Magdalene.

“The potwaller is understood as one who furnishes and cooks his own diet, whether a householder or a lodger, but he must be one of them.

“By furnishing his own diet it is understood that he furnishes all the materials for preparing his diet. The potwaller must also be resident within the borough six months previous to the election.”

The statement on behalf of the petitioner's as to the ancient right of election of members to serve in Parliament for the borough of Taunton, was:—

“That the right of voting is in inhabitant potwallers, having a settlement in the parish of Saint Mary Magdalene, and not having received alms or charity within a year before the election, and that a potwaller according to the usage of the said borough, and within the meaning of the last determination of the House of

1838. Commons is one who, whether he is a lodger or householder, has the sole dominion over a room with a fire-place in it, and who furnishes his own diet, and has cooked it at his own fire."

Mr. *Bere* stated that the only difference in the statements was, whether it was sufficient that a man should have the means of boiling his pot, or whether he must not actually have boiled his pot, at least once, to establish his potwalling character.

Mr. *Kinglake* contended, that as the last resolution of the House of Commons was ambiguous in its terms; witnesses might be called to explain it.

The Chairman assented.

Evidence was then given on the part of the sitting member to support the statement delivered in on his behalf.

Mr. *Kinglake* on this evidence having been gone through, contended that it had been proved that it was not at all necessary, that a man who claimed to be a pot-waller should have actually boiled a pot or used his fire for the purpose of cooking his food, but only that he should have had all the means of enabling him to do so. The cooking his food was only evidence of the dominion over the room, of the ability of the occupier to furnish his own diet, and of his habit of so doing. The fact of cooking was no necessary ingredient of the franchise. There was a broad distinction between the facts which were used as evidence of a right, and the right itself. The boiling of the pot referred to by the witnesses has been generally resorted to as strong proof that he who so boils furnishes his own diet, but that affords no inference that the act of boiling was a part and parcel of the franchise.

Mr. *Bere* stated that the petitioners were indifferent to the question. He should content himself with calling the attention of the Committee to the evidence of one of the

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most intelligent witnesses, called on behalf of the sitting member, who had said distinctly that he considered the boiling of the pot at least once in the six months, previous to the election, to be an ingredient of the right as well as evidence of it. He also stated that the petitioners had called no witnesses on the subject, considering the question immaterial for the purposes of the pending inquiry.

Resolved.—That the Committee had negatived the statement on the part of the Petitioner.

That the Committee had negatived the statement on the part of the sitting member, and that they had found that the ancient and reserved right of voting in the election of members to serve in parliament for the borough of Taunton, is in the inhabitant potwallers, having a settlement in the parish of Saint Mary Magdalene, Taunton, and not having received alms or charity within a year before the election, and that a potwaller, according to the usage of the said borough, and within the meaning of the last determination of the House of Commons, is one whether he be a householder or lodger who has the sole dominion over a room with a fire-place in it, and who furnishes and cooks his own diet at his own fire-place, or at some other place within the same house, at which fire-place he had a legal right so to do, and who has actually cooked his diet at such fire-place; to entitle such potwaller to vote he must also have resided within the ancient borough for six months previous to the day of election, according to the 26 G. III. c. 100.

ROBERT HELLING'S CASE.

Registered as 10 $\frac{1}{2}$ householder, described on poll as joint occupier of a house in Fore-street, South Side; voted for Lee, and objected to for change of occupation.

Mr. Bere stated that he admitted that the voter ceased to occupy the house in Fore-street, on the 5th July 1837,

The Committee would not question the decision of the revising barrister on a claim, without the production of

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the written
claim on which
he adjudicated.

but he should shew that Hellings had a house in High-street worth more than 10*l*. a year, which he had occupied more than sufficient time before the registration to give him a qualification, and that his solicitor at the registration put in a claim on the part of Hellings to be registered for the successive occupation of houses in Fore-street and High-street, and that the revising barrister had decided against his claim, which decision he was prepared to impugn.

A witness was called who proved that Hellings had carried on business alone at Taunton, in Fore-street in February 1836, at which time he took a partner and removed to the house in High-street, where he resided at the time of the registration in 1836, and of the election in 1837. That witness, as solicitor for Hellings, had sent in two claims on the part of Hellings to the overseers, in 1836, that he had attended before the revising barrister, and claimed for Hellings to be put on the register, for the house in High-street, for successive occupation, and that the revising barrister had decided against the claim. That he had made two claims for Hellings, the other being for joint occupation of the house in Fore-street, which was allowed.

Mr. *Kinglake* objected to the witness stating what the claim was.

Witness.—I have not the written claim here—but I have an examined copy.

Mr. *Kinglake* objected to the production of the examined copy. The Committee could only entertain the claim made before the barrister. The written claim contained the nature of the qualification on which the barrister was called on to decide. In order to re-open that decision the original claim must be produced or its loss shewn. The contents of the claim are of the very essence of the voter's title.

Mr. *Bere*.—The fact of the barrister having adjudicated on this claim is sufficient evidence that a proper written claim had been made.

Mr. Kinglake.—If the decision of the barrister were final and the matter could be considered as a *res judicata* a presumption might be made in favour of the regularity of the necessary preliminary proceedings, but such is not the case. The Committee is called on to re-consider and reverse the matter which came before the barrister. How can that be done without shewing by the best evidence what the matter was?

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The Committee decided that the original claim must be produced.

Vote disallowed.

FRANCIS DAVEY'S CASE.

Registered as potwaller, voted for Bainbridge, objected to for change of qualification.

The witnesses against the vote proved that the voter had resided in London from October, 1836, till a few days before the election, when he had gone to Taunton and voted at the election.

Witnesses were called in support of the vote, who proved that the voter registered in 1836, as a potwaller, for a room in John Davey's house; that he continued tenant of that room up to and after the election in 1837.

Mr. Kinglake, in support of the vote. The 26 G. III. c. 100, s. 1, provides that no inhabitant householder, housekeeper and potwaller, legally settled, &c., shall be admitted to vote, unless he shall have been actually such six calendar months previous to the day of election.

The question here is whether actual residence or inhabitancy is required by this statute. The word "inhabitant" is one of doubtful import.⁽¹⁾ There is no doubt that, for the purpose of acquiring a personal franchise,

A potwaller had resided in London for nine months previous to the election, but had retained the room in Taunton for which he had been registered during the whole time.
Vote held bad.

(1) *Rex v. Adlard*, 4 B. & C. 772. *Donne v. Martyn*, 8 B. & C. 69. *Rex v. Mashiter*, Hilary Term 1837, K. B., W. W. & D. 177.

1838. that inhabitancy means residency; but constructive inhabitancy is, in all cases sufficient, where a right or privilege is given to the "inhabitants."

A person, therefore, for the purpose of exercising his franchise as a potwaller, is an inhabitant where he resides. But an unchanged permanent residence is not required. If so, any temporary absence, even that of a witness attending in London in obedience to a Speaker's warrant, having locked up his room within the borough, would make a chasm in the continued residence, and destroy his right to vote.

There is, therefore, no magic in the word inhabitant, as applied to the case of a potwaller. If a potwaller retain his room, having the power to return to it at any period, that room being the very domicile which confers the potwalling franchise on him, an absence, long or short, will not prevent a legal constructive residence.

Here the voter kept his room and his bed, and actually did return before the day of polling.

In *Winchelsea case*, (1) it was held that two persons were inhabitants of Winchelsea, although they kept no servants nor family at Winchelsea, but kept their houses on their hands, and might return at pleasure, their non-residence notwithstanding. And it is there said that if the absence of three months or more, under a year and a day, should be such non-residence as to make a non-inhabitant, then one month's absence, or less, might produce the same effect, and so great confusion be introduced. (2)

Wotton Bassett (3) is a strong authority; there the voter left his home nine months before the election, and let his home, reserving a bed, on which he slept the night before the election. This was held sufficient inhabitancy. (4)

(1) *Glan.* 17.

(2) *Wotton Bassett*, 166.

(3) *Ibid.*

(4) See *Milbourns Port*, C. & D. 227.

The case of *The King v. Mitchell* (1) is very analagous to this. There a local act required parties to be inhabitants of the borough six months, to entitle them to vote. It was held that soldiers, personally resident elsewhere, having houses at Norwich, were inhabitants.

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Mr. Bere contra was stopped by the Committee.

Vote rejected. (2)

WILLIAM SHADRACK COCKRAM'S CASE.

Registered for a dwelling-house, East-street, North Side, voted for Bainbridge, objected to for loss of qualification subsequent to registration.

The occupier of a leasehold house does not forfeit his right to vote by bankruptcy if he remains in the house, and the assignees do not take the lease.

The solicitor to the bankruptcy was called, who produced the proceedings, and proved that Cockram became bankrupt in May, 1837; that a provisional assignee was appointed on the 6th of June, and that the messenger took possession on the 6th of June. The premises in question were held under a lease. The solicitor of the assignees on their behalf guaranteed the landlord the rent to the 24th June, 1837, on condition that they should not be bound by the lease.

No communication was made with the bankrupt on the subject of the lease, but he remained in the house and assisted in winding up the business, receiving at first 20s. per week and afterwards 30s., under the statute, by the allowance of the assignees.

Cockram continued to reside in the house up to the time of and after the election.

The messenger took possession on the 7th of June and continued in it until July. He had exclusive possession of part of the premises, although the bankrupt still continued

(1) 10 East, 511.

(2) See *Wade's case*, Kinsale, *infra*, 334.

1838. to reside there. The goods were given over to the messenger.

Mr. Bere.—The tenancy was determined by the bankruptcy 6 G. 4, c. 16. The bankruptcy and assignment have divested all interest in the term which is a mere chattel interest out of the bankrupt, and at the time of the election he was no longer tenant of the premises. The bankruptcy was a legal assignment of all his property. 2ndly. The assignees having interposed and consented to take the house and pay the rent for one quarter after the bankruptcy, it could not be held that the voter was in the occupation of the house, and they must be taken to have adopted the lease. 3rdly. If the assignees have not been the tenants of the house, the messenger, who has certain defined duties, and who by virtue of his appointment held possession of the premises, must be considered as the tenant, and not the tenant who was living there by mere sufferance.

Mr. Cockburn.—The lease of the premises did not vest by assignment in the assignees. The case of *Copeland v. Stephens*, (1) is decisive. There it was held, that until some act be done by assignees to manifest their acceptance of the term, the term will remain in the bankrupt and he will be liable to the payment of rent. (2) The assignees have not elected to take the premises. The payment of the rent under the protest that they would not be bound by the lease cannot make them assignees of the lease. *Wheeler v. Bramah*, (3) is an express authority on this point. There the assignees paid rent, protesting that they did not mean to adopt the term, and insisted that this did not constitute them tenants of the premises.

The suggestion that the messenger was the occupying tenant is postposterous. He was there *alio intuitu*, viz.

(1) 1 B. & A. 593.

C. J., in *Tuck v. Fyson*, 6 Bing. 321.

(2) See also the judgment of Tindal,

(3) 3 Camp. 340.

to hold possession of the stock in trade and without reference to the occupation of the premises. (1) 1838.

Mr. Bere was heard in reply.

Vote held good.

After a few other trifling cases had been disposed of, the petitioner withdrew from the contest.

Resolved.—That E. F. Bainbridge, Esq., was duly elected burgess for the borough of Taunton.

That the petition of H. Pitman and others does not appear to the Committee to be frivolous and vexatious.

That the opposition to the said petition does not appear to the Committee to be frivolous and vexatious.

(1) See *Worcester case*, K. & O. 240.

TRALEE.

This Committee was appointed upon Tuesday, March 6th, 1838, and consisted of the following members:—

Edward Divett, Esq. (Chairman) <i>Exeter.</i>	
Peter Hesketh Fleetwood, Esq. <i>Preston.</i>	Ambrose Goddard, Esq. <i>Cricklade.</i>
Lord Fitzalan, <i>Arundel.</i>	Lord Dalmeny, <i>Stirling District.</i>
Sir William R. Clayton, Bart. <i>Great Marlow.</i>	Frederick Paget, Esq. <i>Beaumaris.</i>
Lieut.-Col. Henry Salwey, <i>Ludlow.</i>	George Thornhill, Esq. <i>Huntingdonshire.</i>
Hon. W. H. A'Court Holmes. <i>Isle of Wight.</i>	Sir Samuel Thomas Spry, Knt. <i>Bodmin.</i>

Petitioners—

Electors in the interest of Maurice O'Connell, Esq.
 Counsel for the Petitioners—Mr. Thesiger, Q. C. and Mr. Austin.
 Agents for the Petitioners—
 Sir R. Sydney, *London*, Messrs. Dolan and Potter, *Dublin*.
 Sitting Member—John Bateman, Esq.
 Counsel for the Sitting Member—
 Mr. Harrison, Q. C., Mr. Serjt. Merewether, and Mr. Wrangham.
 Agent for the Sitting Members—Mr. Stephens.

The petition presented on the part of Rickard O'Connell and Richard Leyne, contained various charges of bribery, intimidation, and improper conduct upon the part of the returning officer.

The statement delivered in upon the part of the petitioners alleged, amongst other things, that the majority of votes declared by the returning officer at the close of the poll to be in favour of John Bateman, Esq., was but a colorable majority procured by the means set forth in the petition, and that the real majority of good and valid votes

was in favour of Maurice O'Connell, Esq., and that Maurice O'Connell ought to be permitted to sit and serve in the present Parliament as the legal representative of the borough of Tralee. 18

That divers persons were illegally rejected as voters, on the ground of defective affidavits or certificates of registry, whereas the same were not defective, but were valid in law, and such votes ought not to have been rejected, and ought, now, to be put upon the poll for the said Maurice O'Connell.

That the votes of divers voters who were duly registered, and duly qualified to vote, and who tendered their votes for the said Maurice O'Connell, were illegally struck off the poll and were not reckoned or counted, as being on the poll by the returning officer.

The statement, also, set forth various grounds of disqualification of persons who voted for Mr. Bateman; that they had ceased at the time of polling to possess the qualification in respect of which they were registered; that they had become bankrupts, insolvents, had assigned their qualification; that they were guilty of bribery, treating, and corruption.

It was also alleged, that the petitioners intended to apply to the Committee for a commission to examine their witnesses in Ireland.

The list of the petitioners contained among other statements the following :—

Class No. 1. (1) The petitioners will seek to place upon and add to the poll, for the said Maurice O'Connell, the votes of the following persons upon the ground, that they were electors of the said borough of Tralee and duly voted, or tendered their votes at the said election for the said Maurice O'Connell, but whose votes

(1) It is not imperative upon the parties before a Committee to interchange a list of tendered votes. It is usually done, though the law does not require it : but *quære*, if not otherwise of objections to tendered votes. *Kinsale case, infra*.

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were illegally and improperly struck off the poll, or disallowed or rejected by the returning officer and not counted on the poll for the said Maurice O'Connell; also, that they were duly registered according to law, but were illegally rejected or struck from the poll for the supposed defects in their affidavits or certificates of registry.

Class 8. Contains the names of certain voters on the poll, for the said John Bateman, whose votes are objected to as bad, illegal, and invalid votes; 1st, For that they and each of them, had respectively been discharged from custody, under one or more of the several acts in force for the relief of Insolvent Debtors in Ireland, since they were respectively registered as electors of the said borough and previous to the said election; 2dly, For that they and each of them, after the time of their registry and before they voted at the said election, had assigned the premises in respect of which they had respectively registered; 3dly, For that they and each of them, had, after the time of their registry and before they voted at the said election, ceased to hold and occupy, according to law, the premises in respect of which they were severally registered as electors of the said borough.

Class 9. The petitioners intend to object to the names of the following persons being placed upon, or reckoned or counted upon the poll for the sitting member for the same reasons as are stated as objections in the foregoing Class No. 8, and also, for that they received bribes to give their votes at the said election.

The statement of the sitting member, among other things, set forth:—"That all the persons who polled for him, at the said election, were and are good and valid votes, and were duly and properly registered as electors of the said borough, and that all the persons who tendered their votes at the said election, for the said Maurice O'Connell, and whose votes were rejected, or disallowed by the returning officer, were not entitled to vote at the said election, and were not duly or properly registered as electors for the said borough, and that all persons whose votes were so disallowed and rejected where properly and legally disallowed by the returning officer upon good and sufficient grounds to object to such votes being placed upon the poll,

or counted thereon, for the said Maurice O'Connell, on various other grounds besides those upon which the said petition alleges, that the said votes were disallowed and rejected, which further and other grounds of objection, are fully specified and particularized against such votes in the lists herewith delivered and interchanged. (1)

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"The sitting member means also to contend and insist, that the petitioners complaining of his election and return, had no right to vote at the said election and that they were not registered, or not duly registered as voters for the said borough, and have no right to appear, or to be heard before the Committee, in support of the allegations of their petition."

The following were among the objections contained in the lists delivered in, on the part of the sitting member.

List No. 3. List of persons whose votes were disallowed or rejected at the poll, and each of whom will be opposed and objected to, if the petitioners shall claim to put them upon the poll on behalf of Maurice O'Connell, esquire, by reason that each of such persons, whose votes were so disallowed or rejected, was not duly registered, and that the parchment certificate of his alleged registry as a voter for the said borough, did not state his proper description and residence, and that it did not state the date of his registry as a voter for the said borough, and was in other and all respects, insufficient and substantially defective, null and illegal, and also that his affidavit did not state his proper description and residence, and was substantially defective, null and illegal, and that he was not sufficiently identified in the said parchment certificate, or in his affidavit of registry.

Various other objections, such as defect of qualification, paid agency, omission of a signature to the affidavit of registry, that the party was not duly sworn to his affidavit, &c., were also alleged in the lists of the sitting member, against persons who tendered their votes for Mr. Maurice O'Connell.

(1) See *Kinsale case*, 336.

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Poll-books produced by the clerk of the peace of the county of Kerry.

The poll-books were produced by the clerk of the peace of the county of Kerry, though Tralee has a municipal corporation, and the records of the borough are kept by a town-clerk. Within eight days after the close of the poll, they had been delivered by the provost of Tralee to the deputy of the clerk of the peace of the county, and by him delivered to his principal. The usual affidavit verifying the books was produced. Upon the evidence of the provost of Tralee and of the deputy of the clerk of the peace, who were both called, the books were received without opposition.

JOHN BREEN'S CASE.

A certificate which was itself dated, but did not contain any reference to the date of the registration—held good.

This voter tendered his vote at the time of polling, and offered to vote upon a certificate in this form. (1)

“Borough of Tralee. This is to certify that [John Breen] of [Tralee, Fishmonger] in this borough, was duly registered before me as a voter for this borough, in right of his [dwelling-house and fish market] situate at [Fishamble Lane] in this borough.

Dated this [eleventh] day of April, 1836.

[P. M. MURPHY] Assistant Barrister.

[F. CROSBIE] Clerk of the Peace.

Upon presenting this certificate to the deputy of the returning officer, the following objections were made by the inspector, acting for Mr. Bateman.—“That this person in or about the month of May last, let the premises, in right of which he registered, to a yearly tenant and gave him up the possession thereof; and that his qualification as a voter thereby ceased; and that the said premises were not at the time of registry, of the yearly value of 10*l.*; and that the street, lane, or place in which he resides, or resided,

(1) The words within brackets were written, and the rest were printed. The printed form had been prepared under the direction of the clerk of the peace.

at the time of his registry, is not set out in his certificate, or affidavit of registry, and that the certificate does not show the date of his registry, or that he has been registered within the last eight years."

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These objections were written upon an objection paper, a printed form, (1) and were transmitted to the assessor who determined that the omission of the date of the registration in the body of the certificate was a fatal defect, as it could not otherwise be ascertained that the voter had been registered within eight years, within which time only it could be valid, and also, that it was defective in not following the form set forth in the 2nd & 3rd W. IV. c. 88, schedule D. No. 2. which requires it to be stated, in the body of the certificate, that the party "was this day duly registered." The vote was in consequence rejected.

It was proposed to put this vote upon the poll in favour of Mr. Maurice O'Connell, as having been duly tendered and improperly refused. (2)

Mr. Thesiger.—This voter offered to poll upon his certificate, and the 2nd & 3rd W. IV. c. 88. s. 54, enacts, "that the certificate by this Act directed, and, in default of its production, the original affidavit of registry, shall be conclusive of the right of voting of the person named therein; and that the returning officer, or his deputy, upon the production of such certificate, or affidavit by such person, and upon his taking the oaths hereinafter mentioned, if required so to do, shall admit such person to vote with-

(1) These forms were used in Ireland previous to the passing of the Reform Act, and though no scrutiny can now take place before the returning officer, they are still used, and are often filled up with objections, over which the returning officer has no jurisdiction.

(2) In Ireland, the names of all persons offering to vote, and for whom they offer to vote, are entered upon the poll-book by the deputy returning officer, and then, if required, the usual oaths are administered, or an objection is made to the vote. If an objection is taken, it is written down and sent to the assessor; and if allowed, the vote is struck out in the poll-book. See *Longford case*, 247, *ante*.

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out any other oath, or examination, and shall indorse the initials of his name thereon, with the day, and year, when the same was produced, and that no inquiry whatever as to the right of voting of such person shall be permitted to be made, nor shall any scrutiny be permitted." If then, the voter takes the oaths that may be tendered to him, the returning officer has no power to refuse his vote. Admitting that Breen had removed from the premises, in respect of which he was qualified at the time of his being registered; that he was an alien, that he was bribed, or had received alms; that his disqualification was notorious, still the returning officer had no power to investigate the truth of any of these facts. He could only administer the oaths that a voter may be required to take, and if the oaths were taken, he was bound to record the vote. But in this case, it is said that the certificate was not such as entitled the party producing it to vote; it is not stated, in the body of the certificate, that the voter was "this day duly registered," that is, duly registered upon the day of the date of the certificate. It is, therefore, inferred that the date of the certificate is not the date of the registration, and that as the certificate is only valid during the term of eight years from the time of registration, that time may have elapsed, and a new certificate upon a re-registration may have become necessary. In point of fact there is no foundation for the objection. The Irish Reform Act conferring the franchise upon 10 $\frac{1}{2}$ householders, was only passed in the year 1832, and, therefore, there was no ground to presume that this voter had been registered eight years. But supposing the omission of the date might have created a doubt of the time during which the voter had been registered, still it ought not to prejudice him. The certificate was signed by the clerk of the peace and by the assistant barrister, and it was delivered by the clerk of the peace to the voter, 2 & 3 W. IV. c. 88, s. 28. It was not made out by the voter but by public officers to

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whom the duty of making it out, in the proper form, has been specially assigned. No defect in it can prejudice the voter. What was considered to be a correct and sufficient document, was drawn up and delivered to him. When this certificate was produced, the returning officer had no authority to question its sufficiency. The Reform Act precludes him from entering into a scrutiny, nor ought he to permit the acts of the registering barrister to be contested before him.

Mr. *Harrison* and Mr. Serjt. *Merewether*. (1)—First, the certificate is invalid, and this vote was, therefore, properly rejected, and secondly, assuming the certificate to be valid, it must be shewn that the voter had a good qualification before his name can be placed upon the poll. The 28th section of the Irish Reform Act requires, that the certificate shall be on parchment, and be signed by the clerk of the peace or his deputy, as also, by the barrister, chairman, or judge, declaring the right of the party to be registered, the character and right in respect of which he has been registered, and “the date of such registry”—the date of the registration is imperatively required to appear upon the face of the certificate. How is it otherwise to be known, in the process of polling, when the party was registered, or that the limited period during which his registration is to be valid, has not expired? The time when the Reform Act was passed is immaterial. Would this be a good certificate upon which a voter could poll, if eight years, since the passing of that act, had elapsed? The assessor put this case as an instance of the importance and of the necessity of the date of the registry, appearing upon the certificate. How are the frauds, that its omission may create, to be checked? How can it be known, if old, or

(1) This question was argued in two cases, by Mr. Harrison first, and afterwards by Mr. Serjt. Merewether. In the second case the Committee declined to hear Mr. Thesiger.

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new certificates are produced, at elections that may take place after a second general registration, shall have occurred? Every kind of delay and inconvenience which the production of a certificate, in conformity with the terms of the act, was intended to check, may be expected to happen if this certificate shall be held valid. The right to vote, also, depends upon a previous registration for six months. Ought not the certificate to show this fact upon the face of it? The form of the certificate in schedule (D), No. 2, expressly sets out the time of registration, and the 28th section expressly requires it to be given. Unless the Committee is prepared to hold that the words of the act are not imperative, this certificate must be declared to be invalid. [*Committee.*—If the objection is sustained, will it not render void the election, for the certificates being partly printed and the omission being in the part of the certificates that is printed, they must all of them be alike defective?] No. The objection only affects the certificates given since 1832; but if it should have the effect of disfranchising every voter, the law must take its course.

Secondly, if the certificate is not invalid, it ought to be shewn that the voter is qualified before his name can be placed upon the poll. If a vote is recorded, every presumption is made in its favour, but if it is not recorded, the first step to be taken, by those who seek to put it upon the poll, is, to show that the party tendering his vote was duly qualified. The Committee will not put the name upon the poll and then hear an objection in order to remove it. The petitioners have notice, in the list that has been interchanged, of the ground upon which this vote is sought to be impeached.

Mr. Thesiger.—In the first *Canterbury case*, (1) a sufficient number of votes to constitute a majority in favor of

(1) K. & O. 137, 138.

the petitioner had been tendered at the election and improperly rejected by the returning officer. The Committee put the votes rejected upon the poll, and gave the return to the petitioner, refusing to enter into a scrutiny and leaving the party unseated to petition against the amended return.

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The Committee unanimously resolved:—"That the name of John Breen be put upon the poll," and the Chairman added, that the decision was made upon the validity of the certificate.

Mr. Wrangham.—The votes upon both sides, within the effect of this decision, are then to be put upon the poll, without prejudicing any objections that may be made to their being retained upon it?

This was assented to.

JEREMIAH LEAN'S CASE.

The affidavit upon which this voter tendered his vote, commenced "I Jeremiah Lean, of Tralee, in the town of Tralee, in the borough of Tralee, fishmonger, do swear, &c." The form of the oath in schedule (C), No. 8, of the Irish Reform Act is—"I E. F. of in the city, [town or borough] of merchant, [or as the case may be,] do swear, &c." It was objected, that the affidavit ought to have set out the Street, Lane, or Place in which the voter resided, at the time of his being registered. The assessor of the returning officer allowed the objection and the vote was rejected. (1)

Mr. Theisiger.—The objection to this affidavit is, that it omits to state the Street, Lane, or Place in the borough of Tralee, in which the voter resides, and it is contended that it is, therefore, void. By the 2 & 3 W. 4, c. 88, s. 20, the barrister "is required to take care that such oath shall

(1) In the *Youghal case*, no objection of this kind was made to the affidavits of voters, but it applied to nearly all that were produced.

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be in the form hereby prescribed, or as near thereto as may be ; and that no objection, in point of form, shall at any time hereafter be allowed to any such oath, when signed." Is this affidavit then defective? and if it is, is the defect one of substance or of form? Has the description tended to mislead? Is there any thing omitted that could render it more certain than appears by the affidavit, who the voter is? The qualification of the voter is correctly described in the body of the affidavit, and through this description alone, there would be no difficulty in tracing him. The substantial part of the oath is that which relates to the qualification, and all that precedes the words "do swear," are merely words of form. In the *Carlwo case*, (1) the words "that I am in the actual occupation thereof," were omitted in the affidavit of a 10% leaseholder, and the Committee stopped Mr. Pollock in his argument against the objection taken to the affidavit, being of opinion that it was the duty of the barrister to see that the affidavit signed by him was in the form required, and that the voter ought not to suffer through the fault of the assistant barrister. In this case the voter is actually a marksman. He could not possibly know if there was any defect in his affidavit or what was the most exact form in which it should have been drawn up. He had nothing whatever to do with the preparation of it. If the description of the residence of the voter ought to be inserted, it must be presumed either that the description of the qualification is also the description of the residence or that there was no peculiar designation by which the residence of the voter was known. The words omitted are not material. But even if they were material, the omission, being the act of the barrister, ought not to prejudice the voter. It would be easy to suggest many cases which would furnish the barrister with sufficient and proper grounds for omitting

(1) P. & K. 398, 399. C. & R. 439.

them, and as every thing must be presumed in favor of the franchise, it is fair to presume that such a state of things existed in the present case, as to authorize the omission complained of. 1838.

Mr. Serjt. Merewether.—The Act of Parliament expressly requires the insertion of the residence of the voter in the affidavit. The omission arises from the neglect of the party offering to register. It was his duty to have informed the barrister of his place of residence. This was a fact within his knowledge, and which the barrister could only ascertain through him. The 19th section of the Reform Act directs, that the person declared to be entitled to register “shall verify his title by affidavit,” and the 20th section directs that “every such affidavit shall be signed by the barrister.” The description and the verification of the title is the act of the party registering. Part of the verification of the title is the correct statement of the residence, and it is required to be given to prevent fraud, by giving notice of such particulars as shall enable the voter to be identified. It is not a formal but a material part of the affidavit which affords such particulars. In the earliest acts relating to the registration of voters in Ireland, as well as in the latest, provisions are to be found to secure the description of the residence of every voter, 2 G. I. c. 19, recites that many fraudulent and scandalous practices have been used of late to create and multiply votes at elections, to the prejudice of the freedom of election, and it enacts (sec. 3) that, if required, every freeholder, before he is admitted to poll, shall take the oath set forth in the act, by which he was to declare that his place of “abode is at , in .” And in section 4, “the place of his abode, as he shall declare the same, at the time of giving his vote,” is directed to be entered, with the name of every voter, upon the poll, and this was to be done, in the language of the same section, “the better to

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detect and to punish any offender against the act." So also, 19 Geo. II., c. 11, s. 4; 21 Geo. II., c. 10, s. 3; 25 Geo. III., c. 52, ss. 1, 2, 3; 35 Geo. III., c. 29, s. 41, and, by section 53, the voter was to take an oath in this form: "I, A. B., do swear, that I am a resident inhabitant in the borough of _____, in the county of _____, and that I have been so for twelve months last past, and duly proved and registered my residence twelve calendar months before the present vacancy, and that my house is situated in _____, and that my next neighbours are _____, &c." This oath shows the extreme importance that the legislature has attached to the full and accurate description of the abode of the voter. So also, 37 Geo. III., c. 47, s. 8; 45 Geo. III., c. 59; 51 Geo. III., c. 77; 4 Geo. IV., c. 55, ss. 13, 51; 10 Geo. IV., c. 8. These acts prove that the statement of the residence is equally necessary with the description of the qualification. How can fraud be otherwise prevented? In Ireland the practice of personation at elections is common. How is it to be checked or to be discovered, without the greatest difficulty, a difficulty almost securing perfect impunity, if the abode of the voter is not set forth in his affidavit? The object of the legislature has been to secure the most perfect means of personal identification. Can that be called matter of form which secures this end?

It was resolved—"That Jeremiah Lean's name be put upon the poll, so far as regards the validity of the affidavit. (1)

A petitioner
who had not
entered into re-
cognizances,

When the case of Breen was under the consideration of the Committee, Mr. Rickard O'Connell, one of the petitioners, was called, in order to give evidence of what passed

(1) The Committee, it must be presumed, intended to declare; 1st, That the name of Jeremiah Lean should be placed upon the poll in favor of the petitioner; 2d, That the affidavit was not invalid; and 3dly, That by placing the name of the voter upon the poll, they did not intend to preclude the consideration of any other objection to the vote.

before the assessor, when the vote of Breen was tendered. He admitted that he had retained the agent for the petition, that he believed himself to be liable to pay the expenses of the agent, and that he had subscribed to a fund to defray the costs of the petition. He had not entered into recognizances. His own vote had been rejected by the assessor upon the same alleged defect of the affidavit, upon account of which the vote of Breen had been rejected.

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but who had retained the agent for the petition, examined.

Mr. *Harrison* objected to the examination of Mr. R. O'Connell. The 9th Geo. IV., c. 22, s. 39, enables the Committee to examine "any person who may have subscribed the petition which such Committee may have been appointed to try and determine, except it shall otherwise appear to such Committee, that such person is an interested witness." The Committee may examine a petitioner upon the application of the Counsel for the sitting member, when such petitioner is not otherwise interested than as a subscriber to the petition. *Bridport case*. (1) But Mr. O'Connell is interested in respect of the costs of this inquiry, and his own vote will be sustained by the evidence that he is about to give. His liability to the costs alone, disqualifies him as a witness.

Mr. *Thesiger*.—A voter whose vote is questioned, is considered to be a party before the Committee, and, therefore, when his own vote is objected to, he cannot be examined in support of his own title to vote. But there is no instance of a refusal to examine a witness in a case in which his own vote is not concerned, because the decision may tend to destroy an objection made to his vote. *Phillips upon Evid.* (2) With respect to the question of costs, the witness has not entered into recognizances.

The Committee resolved to receive the evidence. (3)

(1) Not reported, but see P. & K. 277. (2) Vol. 1, p. 47, 48, 7th edit.

(3) See *Dungarvon case*, K. & O. 5.

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In consequence of the decision upon the validity of the affidavit of Lean, sixty-nine votes tendered for Mr. Maurice O'Connell, and thirty-six, tendered for Mr. Bateman, were put upon the poll. The number of votes upon which the return was made, was : for Mr. Bateman, 75 : for Mr. M. O'Connell, 64. The decision upon tendered votes putting Mr. Bateman in a minority of 22, the seat was abandoned.

It was resolved—That Maurice O'Connell, Esq. was duly elected, and ought to have been returned ; that John Bateman, Esq. was not duly elected, and ought not to have been returned ; that the petition was not frivolous or vexatious, and that the opposition to the petition was not frivolous or vexatious.

KINSALE.

This Committee was appointed upon March 27th, 1838, and consisted of the following members :—

Henry Galley Knight, Esq. (Chairman) <i>Nottinghamshire.</i>	
W. Alexander Mackinnon, Esq., <i>Lymington.</i>	Peter Ainsworth, Esq., <i>Bolton-le-Moors.</i>
H. Bingham Baring, Esq., <i>Marlborough.</i>	Kedgwin Hoskins, Esq., <i>Herefordshire.</i>
Charles Greenaway, Esq., <i>Leominster.</i>	E. W. C. Master, Esq., <i>Cirencester.</i>
Thomas Dyke Acland, Esq., <i>Somersetshire, W.</i>	Sir Charles Richard Blunt, Bart., <i>Lewes.</i>
Sir John W. Pollen, Bart., <i>Andover.</i>	James Power, Esq., <i>Wexford Co.</i>

Petitioner—Col. Henry Thomas.

Counsel for the Petitioner—

Mr. Thesiger, Q. C., Mr. Biggs Andrews, Q. C., and Mr. Austin.

Agents for the Petitioners—Messrs. Fladgate, Young, and Jackson.

Sitting Member—Pierce Mahony, Esq.

Counsel for the Sitting Member—

Mr. Pollock, Q. C., Mr. H. R. Bagshawe, and Mr. Cockburn.

Agent for the Sitting Member—Mr. Palmer.

Mr. *Thesiger* stated to the Committee, upon opening the case of the petitioners, that the parties, upon both sides, had agreed that the case should be exclusively resolved into one of scrutiny, and that it had been mutually agreed that the register should not be opened.

The election terminated upon Monday, August 7th, 1837, and the Seneschal of Kinsale delivered up the poll-books to the town-clerk of the borough upon August 26th. The books were produced by the town-clerk, together with the usual affidavits sworn before a magistrate acting within the borough.

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WILLIAM WADE'S CASE.

A freeman
had resided at
Liverpool for
a year previous
to the election,
but had retained
lodgings in
Kinsale during
the whole time :
Vote held good.

The voter, William Wade, seventy-eight years of age, was objected to upon the part of the petitioner, as being a non-resident freeman. In 1836, he sold the house in which he had resided at Kinsale, and on June 14th, 1836, went into lodgings, carrying with him from his former residence, a few articles of furniture. After remaining in his new lodgings only four days, he removed to Liverpool in order to reside with his daughters. He lived at Liverpool, and never returned to Kinsale until the election in 1837, when he voted, and after an absence of about fourteen days, went back again to Liverpool where he had since remained. At the time he engaged the lodgings in Kinsale in 1836, he told his landlord that he took them, in order "that he might have a place to return to, if he and his family at Liverpool should not agree," and he took them by the year. During the election in 1837, he occupied these lodgings. Two receipts for rent were put in; one dated May 10th, 1837, for the rent due for the first half-year, but omitting to state when the rent had fallen due; and the other dated, January 16th, 1838, for the rent "due in November, 1837," for the second half-year. The landlord stated, that he had received the applications of several persons to take the rooms he had let to the voter, and that he had always refused them. The rooms still belonged to the voter, and his furniture, which was placed in them in 1836, had continued in them undisturbed.

Mr. *Thesiger*.—By the 2 & 3 W. 4, c. 88, s. 9, the right of voting is reserved to freemen, so long only, as they shall reside within the borough of which they are free, or within seven statute miles of it. When this voter left Kinsale, he was in doubt what his position at Liverpool might be; family differences might arise; the place

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itself might not be pleasant to him to reside in ; or his great infirmity and age might render it most desirable that he should return to Kinsale. He engaged lodgings, therefore, at Kinsale, which he had a right to occupy at any moment, and he has continued to possess them from July, 1836 to this time. When he was present at the election in 1837, he entered into them ; he found his furniture undisturbed, and he left his furniture in them when he went back again to Liverpool. The rent has been regularly paid and all applications made to the landlord, from other persons, to engage these rooms have been refused. Under these circumstances the Committee must come to the conclusion, that there has been no abandonment by the voter of his residence at Kinsale. The case does not differ from that of a gentleman possessing a house in the country, and another in town.

Mr. Pollock.—This case exhibits a gross fraud most clumsily executed. Wade sold his property in Kinsale in July, 1836, and after remaining in lodgings for four days only, he left the borough in order to reside at Liverpool, where he has since remained with the exception of the short time spent by him at Kinsale during the last election. This change of residence and continued absence from the borough is sufficient to invalidate the vote, if there was no evidence of any other facts. But it is said, that the voter having hired lodgings before he left Kinsale and continued to pay rent up to the time of the election, in contemplation of his returning to occupy them, has preserved his right of voting. It is by small circumstances that fraud is most frequently discovered. Were the lodgings *bonâ fide* reserved for the voter? A collusive reservation will not avail him. The landlord states, that the lodgings were taken on the 14th of June, 1836. If this was the fact, the first half-year's rent would have been due in December, 1836. The receipt put in for the

1838. first half-year is dated in May, 1837, and it does not appear from it, for what months the rent was paid. The receipt for the second half-year is for rent due in November, 1837. Now if the statement was true, that the lodgings were taken by the voter before he left Kinsale, the second half-year's rent would have been due in June, 1837, and not in November. The receipt is dated in January, 1838, and is evidently prepared together with the first receipts, upon a miscalculation of the time when the voter left Kinsale—a miscalculation which the landlord has been unable to explain, and which exposes the fraudulent character of these receipts.

The Committee were unanimously of opinion, that the vote should be retained upon the poll. (1)

DENIS M'CARTHY'S CASE.

A vote having been rejected at the poll on a ground which was abandoned by the petitioner at the trial of the petition was struck off on another ground, of which no notice had been given to the sitting member either by the lists or otherwise.

The voter had offered to poll at the time of the election, and his vote was rejected upon account of his name being written "Denis M'Carthy" in the body of his affidavit of registry, and the affidavit being signed by him "Denis Carthy,"—it was proposed, that the vote should be put upon the poll in favour of the sitting member, and evidence to identify the voter was given.

Mr. *Thesiger* declined to insist upon the invalidity of the affidavit, and objected to the vote being placed upon the poll, on the ground of the insufficiency of the value of the qualification of the voter.

Mr. *Pollock*.—Notice of this objection ought to have been given. Neither the statement of the petitioner, nor the lists that he has delivered in, contain any objection to this vote.

Mr. *Thesiger*.—The petitioner certainly could not have

(1) See *Davey's case*, Taunton, *supra* 313.

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made this objection, if M'Carthy had voted ; in that case, it would have been necessary to have inserted his name in the lists that have been delivered in. But there is no provision in the 42d Geo. III., c. 106, that requires any notice to be given of objections made to tendered votes. The third section enacts, that the parties before a select Committee, shall interchange with and among each other, lists of all such votes, and of the names of all such voters, to which either of the parties propose, or intend to object. It is to those persons only who have voted, to whom the section applies. (1)

Mr. Pollock.—The term “voters” extends to and includes all persons who claim, or have a right to vote. The name of this voter is inserted in the poll-book, as having tendered his vote in favour of Mr. Mahony. In the *Tralee case*, (2) the votes of numerous persons had been tendered, and rejected, upon account of an alleged defect in their affidavits, but both the parties before the Committee delivered in objections to such votes. They anticipated the possibility of the objection to the affidavits being overruled. There is nothing in the words of the Act to distinguish tendered or polled votes. A voter is every man who is registered as qualified to vote. The inquiries of the Committee are limited by the 42d Geo. III., c. 106, s. 3, to the matter or thing specified and contained in the lists or statement respectively, or in the petition complaining of the return or election, and no witness or witnesses

(1) In the acts relating to elections, the term “voter” has not this restricted meaning. In the English Reform Act, sect. 40, “the list of voters” made out by the overseers, previous to revision, is to be sent to the clerk of the peace ; sect. 50, barristers are “to revise the lists of voters ;” sect. 54, “the list of voters” signed by the barrister “shall be deemed the register of electors ;” and in sect. 59, this register of electors is called “the register of voters.” In the Scotch Act, electors are called “voters.” In the Irish Act, the word “voter” is used for elector, and by sect. 49, the sheriff is directed, *before* the day fixed for an election, to cause to be made a true copy of the “register of voters.”

(2) See *Tralee case*, *ante*, p. 321.

1838. can be called, or examined, to any matter or thing not so specified, not contained in the petition, the statement, or in the lists, and the Committee is consequently precluded, by the negative words of the Act, from entertaining this objection to the value of the qualification.

It was resolved—That Mr. *Thesiger* be allowed to proceed.

Mr. *Pollock* applied that the case might be delayed until the next day, and that the counsel for the petitioner should state all the objections he intended to make to the vote. In order to answer any objection, it would be necessary to make inquiries of the witnesses in attendance, and it would be obviously improper that this should be done at the door of the Committee room, during the progress of the evidence in support of the objection.

Mr. *Thesiger* stated that the objections to the vote were :—That the premises occupied by the voter were not of the value of 10*l.*, and that the premises occupied by the voter were not held by him under the same landlord.

The further consideration of the case was adjourned until the next day, when the vote was disallowed, upon account of the insufficiency of the value of the premises, in respect of which the voter was registered.

EDWARD BARRY'S CASE.

Where there was a mistake in the affidavit arising from a clerical error of the barrister, the vote was held good.

The name of this voter was written in the body of his affidavit of registry, "Edmund Barry," and it was signed by him "Edward Barry." His vote was tendered and rejected. In September, 1837, he re-registered in respect of the same qualification, described in his first affidavit.

Mr. *Pollock* proposed to put this vote upon the poll in favor of Mr. Mahony, and, after a full argument, the Chairman expressed himself satisfied that the error in the affidavit was that of the barrister, and not of the voter,

and the vote was put upon the poll in favour of the sitting member.

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GEORGE GRIFFITH'S CASE.

Mr. *Austin* proposed to put the name of this voter upon the poll for Colonel Thomas. He had tendered his vote, and had been rejected, on the ground that his certificate, though it was signed by the assistant barrister, was not countersigned by the clerk of the peace.

The omission of the signature of the clerk of the peace to the certificate of a voter, held not to affect the right of the voter to poll upon his affidavit.

The voter, upon presenting his certificate at the poll, was objected to, upon its being discovered that the certificate had the signature of the assistant barrister only. Mr. Fitzsimon, the agent for Colonel Thomas, then called for the production of the affidavit, and demanded that the voter should be permitted to poll from the affidavit. The affidavit was produced, but the vote was rejected, upon account of the omission of the name of the clerk of the peace in the certificate.

Mr. *Austin* contended, that the signature of the clerk of the peace was immaterial. If the certificate was signed by the assistant barrister, it was sufficient. If it was defective, then it was no certificate at all, and in the absence of the certificate, the voter was entitled to poll from his affidavit. The certificate is simply directed to be produced, to facilitate the taking of the poll, and it is optional, if the voter will poll from his certificate or from his affidavit of registry.

Mr. *Pollock* contended that the affidavit could only be referred to, in the absence of the certificate, and that, as the party claimed to vote upon his certificate, his right to vote could only be tried by its sufficiency.

The Committee unanimously resolved to put the vote upon the poll.

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CORNELIUS DONOVAN'S CASE.

A voter subsequent to registration, conveyed the land for which he had been registered to trustees in trust, amongst other things, for himself for life, and voted without being re-registered. Vote held good.

The petitioner objected to this voter on two grounds :—
 1. That between the period of his registering and of his voting, the voter had ceased to hold, or occupy, the premises out of which he registered and claimed to vote, and that, at the time of his voting he was not in possession of the said premises, or of a sufficient part thereof, in value, to entitle him to vote. 2. That he was disqualified, by law, from voting, being, at the time of his voting, of unsound mind. (1) The first objection alone was insisted on.

The voter registered in October, 1832. In December, 1833, he executed a deed, by which after reciting, among other things, that he was lately married, and that he had not, previous to his marriage, made any settlement on his wife, or upon any issue of his marriage, he conveyed certain property, including that in respect of which he was registered, and of which he was the owner, to one M'Carthy, upon trust, during the life of the voter, and of his wife, to receive the rents and profits of the same, and to pay thereout, in the first instance, head rents, and certain expences, of the trust, and then, that the said M'Carthy might reimburse himself, any costs, charges, or expences, which he had already paid and advanced, or thereafter might have occasion to pay or advance, out of his own proper monies, for the said Donovan, upon any account whatever, or in order to give effect to the trust, and all expences he might incur in collecting the rents; then, after deducting one shilling in the pound, in each year, from the gross amount of the rents collected, as a compensation to M'Carthy for his trouble, to pay the residue to

(1) *Haywood*, 164. *Male on Elections*, 165.

1838.

Donovan and his wife, during their joint lives, upon their joint receipts, with subsequent limitations, for the benefit of the wife and family of the voter. The voter continued to occupy the same premises, after he executed this deed, that he had previously occupied. Donovan was indebted to M'Carthy when the settlement was executed, and, according to M'Carthy, who was himself examined, was still indebted to him. But M'Carthy admitted that, out of 72*l.* in the year that he collected, he had received 10*l.* It did not appear what sum was due, in the first instance, to M'Carthy, and he did not claim more than between 3*l.* or 4*l.* as remaining due.

Mr. *Andrews* contended that the voter had parted with the qualification for which he had registered, and that until he was re-registered he was not entitled to vote, and also, that so long as M'Carthy was a creditor of the estate, the voter had no right to vote.

Mr. *Pollock*.—Since the voter registered in 1832, his occupation has never been disturbed. As owner of the premises in respect of which he was registered, he included them in a voluntary settlement made by him for his own benefit, and for that of his family. Numerous cases of this kind must have occurred, especially in counties where the subject-matter of the qualification has been included in a family settlement, reserving to the party registered his present interest, but the necessity of a re-registration has not been heard of. The 47th section of the Irish Reform Act reserves to the *cestui que trust* or mortgagor in possession, a right to register and to vote, notwithstanding any trust or mortgage. Surely, then, if the mortgagor may register and vote, that case is much less strong than this. That this voter might have re-registered is not disputed; but was re-registration necessary after he executed the settlement? He remained the owner and occupier of the premises for which he was re-

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gistered, and if neither the ownership nor the occupation were disturbed, there was no new title for which he was called upon to register. Instead of being the legal he became the equitable owner of the premises, and if he had re-registered, it would still have been as owner and occupier, and the equitable nature of his estate would not have been noticed. The trustee can do no act adverse to the voter, or interfering with his enjoyment or occupation of the property.

The *Chairman* stated, that the Committee were anxious to do the strictest justice. They had decided that a change of a legal to an equitable title, did not affect the qualification of the voter, but they wished to ascertain whether Donovan or any other person had been in the receipts of the rent, and whether the premises for which he was registered were of 10*l.* value.

After hearing further evidence, it was *resolved*, That the vote should be allowed. (1)

WILLIAM WARREN'S CASE.

An honorary freeman elected in 1824, but not sworn in till September, 1832, held entitled to vote.

The objection to this voter was, that he was an honorary freeman admitted to his freedom since March 30th, 1831. (2 & 3 W. 4, c. 88, s. 9.) The affidavit of registry was signed by "Richard Pennefather, the going judge of assize of the Munster Circuit," who upon an appeal from the decision of Joseph Stock, the assistant barrister of the East Riding of the county of Cork, placed the name of the voter in right of his being a resident freeman upon the register of voters for the borough of Kinsale.

The town-clerk of the borough produced the charter

(1) In this case the Committee recalled a witness and examined him, after counsel had completed their arguments.

under which the corporation at present acts, and read the following passage from it :— 1838.

“ Provided that once a-year, the aforesaid sovereign and commonalty may ordain and constitute, such and so many freemen as and which to them shall appear meet and to us and to the said commonalty shall be sworn.”

The following entries from the corporation-books were also read :—

“ At a council held the 11th day of August, 1783. It was this day ordered, that the Right Hon. John Lord Baron Kinsale, &c. (names of other persons) be admitted and taken into our society as *honorary* burgesses of this corporation, and that patents of burgesship be presented to them for that purpose.

“ At the same time it was ordered, that Ellwell Leary, &c. &c., freemen of this borough shall be admitted and sworn burgesses thereof.

“ And also, at the same time it was ordered, that the Hon. Rev. Gerald De Courcy, &c. &c., be admitted and sworn freemen and burgesses of this town at the next and any future court of D'Oyer Hundred for the said town, to be held for the said town.

“ At a council held the 13th of August, 1824, it was this day ordered that J. McD., &c. freemen of this corporation, shall be admitted and sworn burgesses thereof at the next, or any future court of D'Oyer Hundred, to be held whenever they appear ; and also, at the same time, it was ordered that the Right Hon. Baron Kinsale, &c. ; also, that S. Brownlow, Junr., major 66th foot, &c., *William Warren*, lieutenant in the rifle brigade, &c. &c., all of the town of Kinsale, shall be admitted and sworn at the next or any future court of D'Oyer Hundred, to be held for the same at which they shall appear.”

“ At a court of D'Oyer Hundred, for the town of Kinsale, 12th of September, 1832, *William Warren* of the town of Kinsale, in the county of Cork, esquire, is this day admitted a freeman of the town, he having been duly elected a member of the said corporation, pursuant to an order of council of the 13th day of August, 1824. Dated the 12th day of September, 1832. By the court, George Newman, town-clerk.”

1838. The stamp upon the admission was 3*l*. being the stamp for an honorary admission.

From the evidence of Mr. Newman, the town-clerk, of Mr. Heard who had been for upwards of twenty years a member of the corporation, and of Mr. McDaniel, who was "common speaker," it appeared that no persons were admitted freemen by reason of birth, servitude, or marriage. All the admissions that were made were by courtesy. The elections took place at a council, and the swearing in at a court of D'Oyer Hundred. Warren was elected purely *ex gratia*, and no person had ever been elected of right. He was elected with thirty-two other persons. After his election he might have demanded to be sworn in, and upon being sworn, his name would have been entered upon the panel. The corporation consists of burgesses and one freeman, who is called "common speaker," and is considered to be the representative of the freemen. Honorary burgesses have no privileges in the corporation, but they are free from gateage toll after being sworn. They are sometimes admitted by patent, by an order of council. The freemen are occasionally called "freemen at large."

Mr. *Pollock*.—Persons who are elected into corporations as freemen, who, previous to their election, have no right, or colour of claim to be elected, are honorary freemen. When they are called freemen *ex gratia*, by special favour, or by courtesy, the same proposition is expressed. Formerly, persons so elected had, in many towns, a right to vote at the election of members to serve in Parliament, immediately upon their admission, and batches of such freemen were frequently made in order to give support to a particular party, or to turn the scale of an election. The abuses of this system were loudly complained of, and various laws were passed to check them.

Rogers's Law of Elections. (1) By the 3 G. 3, c. 15, commonly called, the Durham Act, no person can vote at an election, as a freeman, who has not been admitted to his freedom twelve calendar months before the first day of such election; but section 2, provides that the act shall not apply to persons, entitled to their freedom by birth, servitude, or marriage. The sole consideration in these cases is, the title under which the admission is made. If there is no right or colour of title, it is by courtesy, by favor, or in other words, honorary or occasional. Of this character are all the admissions at Kinsale. Once a year, freemen may be made without any limit to their number, and these persons until the 2 & 3 W. 4, c. 88, were entitled to vote in the choice of members of Parliament. But by this act the provisions of the Durham Act are extended. The 9th section reserves the right of voting to all persons entitled to vote when the act was passed, and to all persons who by reason of birth, service, or marriage, or of any statute then in force, should thereafter be admitted to their freedom, but it provides, that no persons who, since the 30th day of March, 1831, have been, or thereafter should be admitted as honorary freemen, should be entitled by virtue of such admission to vote, or register as freemen under that act. Is Warren within the reservation of this section? He was not admitted in right of birth, servitude, and marriage, for no such right exists in this borough. Under the proviso he is positively excluded from any title to vote. The entry of the election of Warren is, that he is to be "admitted" at any future court of D'Oyer Hundred. There are no words in it of present admission. He might have been admitted at the next court, and under the 33 G. 3, c. 38, (1.) he might within seven years after his election have

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(1) Ed. 1837, p. 105.

1838. enforced his admission. But he neglected to be admitted for eight years and at the time when he was admitted, the corporation might have refused to permit it. The words of the Reform Act are express, that no honorary freemen admitted since March 30th, 1831, shall be entitled to vote. When was the admission made? Not when Warren was nominated, or elected, but when he was sworn in and enrolled upon the panel. *Williams v. Evans*. (1) In this case, an action of debt was brought under the statute 3 G. 3, c. 15. The defendant in October, 1789, applied to the Common Council of the borough of Carmarthen to be admitted a burgess, and it was ordered that he should be admitted and sworn a burgess of the borough, but he was not sworn, or enrolled a burgess until February 15th, 1796. On the 27th of May, 1796, and within twelve months before the exhibiting of the plaintiff's bill, he voted at an election of a member of Parliament for the borough of Carmarthen. The judgment of Lord Kenyon, expressly applies to the case before the Committee. "Then, it is said, that the defendant had an inchoate right before; but it must be remembered, that he had no right whatever, until the corporation chose to confer it upon him by what is called, an *ex gratia* admission, and that that was not consummated until the swearing in. But this inchoate right cannot assist the defendant; the rule *expressio unius est exclusio alterius* applies to this case, for the only excepted cases of inchoate rights, in the second section, are those of birth, marriage, or servitude." The order of October, 1789, enabled the voter to be admitted, but it was the opinion of the Court that he was not admitted until the time when he was sworn in and enrolled a burgess. Here also, the order for the admission of Warren was made in August, 1824, but he was not enrolled

(1) 8 T. R. 246.

upon the panel of freemen until September, 1832. *Case of the Freemen of Coleraine.* (1) 1888.

The proviso of the 9th section, narrows down the meaning of the words "now by law entitled to vote." The enactment must be taken with it. If it had been declared that all freemen might vote, provided they were thirty years of age, could the enactment be separated from the proviso? The clause was intended for the purpose of preventing the frauds that were supposed to have been attempted in the making of large batches of freemen, shortly before the Reform Act passed, for the purpose of out-voting the persons who would be qualified under the new franchise. If the vote of Warren shall be decided to be valid, freemen clearly within the proviso of the clause must be held, in opposition to its express terms, to be entitled to vote.

Mr. Andrews.—The question to be determined is, whether Warren is an honorary freeman within the proviso of the the 9th section of the Reform Act? The class of freemen considered to be honorary by the corporation of Kinsale, are those admitted by patent. There are, also, freemen who are created burgesses at the time that they are made freemen. Both these classes are distinct from that of which Warren is a member. He is not among those persons known at Kinsale, as honorary freemen. His admission took place when he was elected, for after his election no subsequent court of D'Oyer Hundred could refuse to swear him in. The 33 Geo. III. c. 38 (I. A.) does not affect his title, the corporation having made no objection to his being sworn, (*Mr. Pollock* assented.) Then are freemen elected before March 30, 1831, and since sworn in, entitled to vote? The 9th section of the Reform Act must be taken as an entire whole. The right of voting is reserved to "all freemen, freeholders, and per-

(1) *Alcock's Reports.*

1838. sons who by reason of any corporate, or other right, are now by law entitled to vote," and—but not as an exception—to "all persons who by reason of birth, marriage, or service, or of any statute now in force, shall be at any time hereafter, admitted to their freedom;" and then comes the proviso—which, as it is in restraint of particular rights, must receive a narrow construction—declaring that honorary freemen, admitted to their freedom since March 30, 1831, shall not be entitled to vote. Does not the fixing of this date show what was intended? All existing rights were to remain as if the Act had not passed. Coupling the proviso with the enactment, it is clear that rights existing previous to March 30, 1831, were left untouched. After Warren was elected, his title to vote was perfect. But assume that it was not so, and that he had only an inchoate right still, it is evident that the Act intended to preserve such rights. The object of the clause was not to prevent the mere ministerial act of administering an oath to persons whose freedom was acquired previous to March 30, 1831, but to destroy the title of honorary freemen to vote, acquired since that time. In *Williams v. Evans* a penalty had been incurred by the defendant, he having voted before he had been sworn in twelve months; but his right of admission was not questioned. When Warren was elected by the corporation, he could have enforced his admission. The court of D'Oyer Hundred possessed no choice, it did not elect and it could not reject. What then was the nature of the admission, if Warren was then admitted to his freedom? He was not admitted by the court as an honorary proceeding, but in virtue of an inchoate right enforced by his own act. (1) In the *Coleraine case*

(1) In *Williams v. Evans*, Mr. Wood, afterwards Baron Wood, in arguing for the defendant said, "that at any rate the order for the defendant's admission, having been made six years previous to the election, he could in no sense be considered an occasional freeman, so as to have incurred the penalty of the

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the question before this Committee was not considered. It was assumed, throughout the argument, that the swearing in, or what is called the admission, was an honorary proceeding. This it could not be. The voter could have enforced it; it was a voluntary act upon his part, and the court of D'Oyer Hundred could not prevent it. There was nothing honorary in its nature, or character. The Reform Act does not interfere with a right of voting of this kind. It carefully confirms and keeps alive all rights existing previous to March 30, 1831, and only interferes with rights acquired subsequent to that day.

It was resolved :—That the vote of William Warren was a good vote.

Mr. *Pollock* applied to the Committee for permission to be reheard upon this case, upon account of its great importance. He regretted that the practice of the courts of law, which enables both parties to reply upon each other, in the discussion of a question of law, did not prevail in Committees. He was entitled to bring forward another case, similar to the last, and to re-argue the whole question upon it, but considered it to be most respectful to the Committee to ask for a re-hearing. There were several cases in which an application of this nature had been complied with. *Rochester case* (1); *Kingston upon Hull* (2); *Youghal case* (3); *Shaftesbury case* (4); *Lincoln case* (5).

Mr. *Thesiger*.—The cases in which applications of this

act. The swearing in is a mere matter of form; because, after his nomination, he had a right to be sworn in, at any fortnight court, and a *mandamus* would have issued for that purpose to the corporation if they had refused to swear him in. He had, therefore, a complete title by relation to the time of his nomination and such a case is neither within the mischief, or the enacting words of the act." But Lord Kenyon said, "that he thought it was a remedial act and ought to receive a liberal interpretation in order to guard against the mischief." According, however, to the argument of Mr. Andrews, the case of Warren was not within the mischief provided against by the Reform Act.

(1) K. & O. 83.

(2) K. & O. 429.

(3) K. & O. 448.

(4) *Infra*, 365.

(5) P. & K. 382.

1838. kind have been granted, are very few. In the *Rochester case* it does not appear that the Committee had come to any decision when the rehearing was applied for. In the *Hull case* the Committee simply re-considered its decision without hearing any argument. In the *Youghal case* it does not appear by the report that the application was opposed (1). In the *Lincoln case*, Mr. Harrison was desirous to cite new authorities. In the *Youghal case* (2) of this year an application for a re-hearing was refused. (Mr. *Pollock*.—I admit that in many cases the application has been refused—in the *Dublin case* (3) for instance.) In this case there are no new authorities to cite, and no new facts to bring forward.

Mr. *Pollock*.—The cases in which a re-hearing has been granted, bear no comparison in importance to the one before the Committee. As the decision that had been made appeared to militate against a decision of the judges in Ireland, and was the first that had been made, by a Committee, upon a question of great moment, he was desirous to be re-heard. (4)

The Committee resolved not to consent to the application.

It was stated by several members of the Committee, that Mr. *Pollock* was not to consider himself precluded from re-arguing the question upon a new case. This Mr. *Pollock* declined to do.

(1) This case was, in the first instance, argued by Mr. Austin and Mr. Harrison, and when the re-hearing was allowed, the same counsel again argued it. Mr. Harrison opposed the re-hearing, and Mr. Thesiger replied, that he could argue the question upon another case. The Committee no doubt considered it to be right, that they should correct the first decision if it should appear to them, upon a second argument, to be erroneous.

(2) *Infra*.

(3) *Ante*, p. 193.

(4) *Shaftesbury case, infra*, 365.

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EDWARD BUTLER'S CASE.

This voter was objected to by the petitioner, under the 43 G. 3, c. 25, "being disqualified, by law, from voting being employed, at the time of the election, by, or under the Post-master-general, or his deputy, or deputies, in receiving, collecting, or managing the revenue of the Post-office, in Ireland." The employment of the voter was that of a mail-guard.

The vote of a
mail-guard
held good.

Upon his appointment, the voter entered into a bond dated July 5, 1834, the condition of it being "that if he would well and duly perform the duties required of him," as expressed in a paper entitled "Instructions for mail-guards," (1) "then, &c." The instructions stated, that "if in post towns he, on any account, collects, or delivers, letters or packets, or does so upon the road, (except in some particular cases where the Post-master of the district or superior officers are authorized to order it,) he will be liable to an information." It was stated in evidence, that the mail-guards are paid by the Post-office, that they were not authorized to receive the postage on letters, that if they took up any letter upon the road, they would put into the next Post-office, and that if the postage on any such letter was taken, it would be an act of civility and not as part of their duty.

Mr. *Thesiger*.—There can be no doubt that this voter was employed under the Post-master-general. The voter is permanently engaged and his duty is to take charge of and to

(1) On this paper of printed instructions was the form of an oath to be taken, or which, until lately, was taken by mail guards. It contained this passage, "and that I will not stop to deliver any letter or letters, on the road except ordered to do so by the Post-master, or by a superior officer under the Post-master-general, such letters being given by him or them, for that purpose, and that I will never take up, in any post town, nor on the road, any letter or letters, but such as I may and shall put into the next post-office."

1838. keep in safe custody the letters delivered to him in order to secure the collection of the revenue upon them. If he does not actually collect the revenue he is engaged in its management, as without his protection it would suffer. *Glasgow case*, (1) *Dublin case*. (2) From the character of his appointment and the duties he has to perform, the voter is within both the words, and the spirit of the act. If he was directed by the Post-master-general, to receive the postage upon any letters, he could not refuse, as the terms of his bond, and his instructions require him to comply with such an order.

Mr. *Pollock*.—The words of the act apply to persons employed in receiving, collecting or managing the revenue of the Post-office. But a mail-guard who merely carries sealed bags from one part of the country to another, neither collects, nor manages the revenue. (*Chairman*.—The Committee have no doubt upon that part of the question, they wish you to consider the exception in the instructions.) It is the duty of the mail-guard to abstain from collecting the revenue, and if he has orders to do so, in a particular case—and it does not appear that any such order is ever given—it is not as part of his ordinary duty, but as an exception to it. The liability to be so employed is not sufficient to disqualify him. The letters he would receive from the Post-master would in all probability be upon the public service and be exempt from postage. Government packets, writs to sheriffs, and official documents sufficiently satisfy the exception without connecting the voter with the collection, managing or interfering with the revenue. *Cirencester case*. (3) Even supposing the Post-office might employ the guard, according to the words of the exception in his instructions, there is no evidence

(1) 1 Peckw. 354. See also, *Harwich case*, 1 Peck. 398.

(2) *Ante*, p. 198.

(3) 2 Fraser, 454.

that the nature of such employment would authorize him to collect any part of the public revenue.

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The Committee resolved to allow the vote.

In another case of a mail-guard additional evidence was given to shew, that he might have in his charge part of the revenue of the Post-office, but Mr. Andrews stated, that as it did not alter the material facts of the former case, he should not again argue the question and abandoned the objection.

HARRIS FUDGER'S CASE.

This voter, whose trade was that of a shoemaker was objected to by the sitting member, on the ground, that under the 43 G. III, c. 25, he was concerned, or employed in charging, collecting, levying or managing the duties of customs in Ireland. He was put upon the list of glut-tide-waiters, or supernumerary tide-waiters upon October 27, 1826, and he had been last employed in December 1835. The tide-waiters on the Customs establishment receive a commission and receive fixed salaries; the supernumeraries are only occasionally employed and receive no salary, being paid a certain sum for the particular duty performed. Before any person is employed in this capacity, the Customs officers at Kinsale, send his name to the Board of Customs at Dublin for approval, and if approved of, he is employed as occasions offer. The employment of the voter was authorized by his name being written upon the back of a letter from the Board of Customs which stated that the voter might be employed, when requisite, under the regulations contained in an order of the 12th of July, 1826. The last time the voter served was in December, 1835, but about ten days before the election, the comptroller at Kinsale, called upon him to act, when he, in effect, replied "that he could not act that day, but his brother who was a tide-waiter would act for him; he

The vote of an occasional tide-waiter held good.

1838. was afraid that if he acted it would be injurious to his vote, but he was willing to act after the election." He had not given any intimation of resigning his appointment, nor had it been revoked at the time of the election. Having voted he would not again be employed. (1)

Mr. Cockburn.—There can be little doubt that this voter is within the terms of the 43 G. 3, c. 25. The act intended to provide against the executive having any control over electors in his position. Whether the employment is permanent, or occasional it matters not. If the trade of Kinsale should become flourishing the duties of a supernumerary might become frequent and his appointment be of considerable value. He was disqualified by holding the appointment within twelve months before the election. Until it was revoked, or resigned, the incapacity to vote continued. When the voter was called upon to act, did he repudiate his appointment? No. He says, "excuse me to-day it may be injurious to my vote." From this language, it is clear, that he had not resigned. His appointment, under a regulation of the Board of Customs has since been cancelled, but this confirms the fact of his holding it under the board. (*Chairman.*—Is not the case of this voter similar to the mail-guard?) The duty of the

(1) The following is a copy of a circular sent to the Commissioners of Customs by order of the Treasury:—

Treasury Chambers, 7th August, 1833.

Gentlemen,

With reference to your memorial enclosing a copy of a case, and opinion of the law officers of the crown respecting persons, temporarily employed in the service, voting at elections, I am commanded by the Lords Commissioners of his Majesty's Treasury to desire that you make this opinion generally known to the officers under your superintendence, and require all such persons as may come under the act, as explained by the officers of the crown, strictly to adhere to the provisions of the law which precludes them from interfering at elections.

I am, &c.,

Commissioners of Customs.

FRANCIS BARING.

Copy of the opinion referred to, "We are of opinion that the persons employed temporarily under the different revenue boards, are precluded by the act in question from interfering in elections, provided they are employed in, or towards the charging, collecting, levying, or managing of the revenue."

tide-waiter includes the seizure of contraband goods, and he is put in charge of vessels in order to secure the payment of the duties chargeable upon the cargo. The mail-guard has simply to take bags from one part of the country to another, and is not concerned in the collection of the postage. If he held the bags until the payment of the postage was secured, his case would be similar to this. Few of the officers of the Customs actually receive any portion of the revenue, but they are all of them concerned in the charging, collection and management of it.

1838.

Mr. *Thesiger*.—A voter, in order to be disqualified under the Act, must hold an office. Had this voter any office? None whatever. The names of certain parties, of good character, are transmitted to the Board of Customs, who, in case of pressure of business, may be intrusted to assist the permanent officers. Their employment is approved of in these terms:—"The persons named may be employed, when requisite," not "shall be employed," and no fixed duties are assigned to them. They may, or they may not, be employed. They have no salaries—they are not on the establishment, and they hold no office. By the affidavit of the registry of the voter, it appears that his trade is that of a shoemaker. When no job is given to him by the Customs, he pursues the exercise of his ordinary calling. The case is not so strong as that of the mail-guard. The mail-guard has a permanent appointment under the Post-office; he has a fixed salary; he is constantly employed, and he is bound to the due performance of his duties in the penalty of a bond. This voter is only occasionally, and at distant intervals of time, called into employment. He is paid no salary; he enters into no bond; and it is not imperative upon any person in the Customs establishment to call for his services. The very foundation of this objection is, the holding of an office, which is clearly not the case with this voter.

1838.

It was *resolved*—That the vote should be allowed.

This Committee admitted in evidence “The Registry Rejection Book for the East Riding of the County of Cork,” (1) which was produced from the custody of the clerk of the peace, and the entries on which were signed by the assistant barrister. The object of its production was, to show the reason assigned by the assistant barrister for the rejection of a claim to register. (2)

Mr. *Thesiger* contended that it was admissible in evidence, the assistant barrister acting as a judge during the registration of votes.

Mr. *Pollock* admitted the character in which the assistant barrister acted, but denied that the book produced was a record.

The scrutiny was abandoned by the sitting member, and the Committee *resolved*—That Henry Thomas, Esq. was duly elected, and ought to have been returned a burgess to serve in this present Parliament for the borough of Kinsale; that Pierce Mahony, Esq., was not duly elected, and ought not to have been returned a burgess to serve in this present Parliament; and that neither the petition nor the opposition to it, were frivolous or vexatious. The Committee, also, reported that they had struck the names of certain persons, named by them, off the poll.

(1) This was the title given to it upon its production.

(2) *Printed Minutes*, p. 120.

CASE X.

WALSALL.

The Committee was balloted for on the 13th March, 1838, and consisted of the following Members :

E. Ashford Sanford, Esq. (Chairman), <i>West Somersetshire.</i>	
W. Villiers Stuart, Esq., <i>Waterford County.</i>	Hedworth Lambton, Esq., <i>North Durham County.</i>
Hon. W. S. Lascelles, <i>Wakefield.</i>	Sir Matthew Wood, Bart., <i>London.</i>
W. R. C. Stansfield, Esq., <i>Huddersfield.</i>	H. C. Sturt, Esq., <i>Dorsetshire.</i>
J. Duff, Esq., <i>Banff County.</i>	J. Temple Leader, Esq., <i>Westminster.</i>
T. W. C. Master, Esq., <i>Cirencester.</i>	T. Slingaby Duncombe, Esq., <i>Finsbury.</i>

Petitioners—

Electors in the interest of Charles Smith Forster, Esq.

Sitting Member—Francis Finch, Esq.

Counsel for the Petitioners—

Mr. Serjeant Merewether, Hon. John Talbot, and Mr. Twells.

Agent—Mr. Barnett, Walsall.

Counsel for the Sitting Member—

Mr. Austin, Mr. Cockburn, and Mr. Rushton.

Agents—Messrs. Parkes and Preston.

IN this case the petition was presented against the election and return of Mr. Finch, by electors in the interest of Mr. Forster. At the close of the poll the numbers were, for Mr. Finch, 316, and for Mr. Forster, 296. The case resolved itself into a scrutiny, and the other matters and allegations contained in the petition were not persisted in.

1838.

JARED SCOTT'S CASE.

The Committee refused to go into the case against a voter, on the ground that the third question had not been put to him at the poll.

In this case the voter had polled for the sitting member, and his vote was objected to on the ground of his having changed his residence, between the time of registration and the election. The question was raised, whether the Committee could entertain the objection, unless it was proved that the three questions authorized by the 58th section of the Reform Act had been put.

Mr. *Austin* contended, that if the three questions were not put at the poll, the voter could not be objected to before the Committee. The whole system of the English Reform Act, respecting the register of voters, was a carefully contrived system of appeal, and it was the plain intention of the Act, that Committees should only proceed as Courts of Appeal. If the names of any persons were improperly inserted or omitted in the overseer's lists, there was an appeal to the revising barrister; but he had no jurisdiction, unless the process required by the Act, of giving notice of objection, or notice of claim, had been first followed. Upon this principle, the Committees had all agreed in refusing to enter into any objection which might have been made before the revising barrister, but which had not been brought before him. So, upon the strictest analogy, Committees ought not to examine into the merits of any objection which might have been made before the returning officer. By adopting this principle, the expense of bringing witnesses up to London, and of scrutinies before Committees, would, in a great number of cases, be entirely prevented.

With respect to the authorities on this subject, only one case occurred in 1833; *Sherry's case, Southampton*. (1)

(1) P. & K. 234.

In 1835, the question was raised in the Rochester Committee, (1) and again in the same year before the Canterbury Committee, (2) and the Ipswich Committee; (3) and all those Committees decided that they would not hear any objection which might have been argued before the revising barrister; and the New Windsor Committee (4) held, that the answer of the voter to the third question, was conclusive.

1838.

In the present session, there have been only two cases of scrutiny, the Ipswich and the Reading; in the former there was no interest in arguing the question on either side; and in the latter, there was an arrangement between the candidates that the third question should not be put, in order to save time.

Mr. Serjt. *Merewether*, *contra*, said, he was surprised that the question should have been argued on the ground of there being any analogy between the closing of the register, and the closing of the transactions at the poll. The whole system of registration was new, and had no existence prior to the Reform Act. Before the lists are revised by the barrister, they are required by the Act to be published, and every person, therefore, has time to examine them, and to make such objections respecting them before the revising barrister as he thinks necessary, but all the circumstances relating to the poll are entirely different, no time being then given for deliberation or inquiry. The Reform Act provides that all laws and usages respecting elections are to continue in force unless altered by that Act. Now before that Act, the returning officer had power to receive objections to any voter, and to have any such objection seriously argued; but by the Reform Act, this power is limited, and he can now only ask three questions at the poll.

(1) K. & O. 72.

(2) K. & O. 325.

(3) K. & O. 386.

(4) K. & O. 170.

1838. But even when the returning officer had much better means of examining into the merits of any question than at present, an objection to a voter might be raised before a Committee, although it was not raised before him, and now that his authority was diminished, the necessity for the Committee to entertain such objections was of course increased. One great object of the Act was to shorten the time of polling; but if the three questions were to be put to every voter at the poll, it would be impossible in populous places to take the poll in one day. Again the returning officer was not authorized to put the three questions, except when required on behalf of a *candidate*. How could a waiver on the part of a *candidate* be binding on the *electors*, who were also interested in the result of the election, and who, as they were in the present case, might be the parties who petitioned against the return? With regard to the expense being saved, by such a principle being recognised as was contended for on the other side, every candidate would be obliged to ascertain before the day of polling, whether each voter retained his qualification, and that expense would be much greater than the expense of bringing a few witnesses up to London. Every case of change of residence had been examined into by every Committee, without proof being required of the questions having been put. *Southampton case*, (1) the *Rochester case*, (2) the *Monmouth case*, (3) and also in the present *Reading case*. The *Ipswich case* in this session turned entirely on a scrutiny, and yet this question was not thought worth mooting.

Mr. *Austin*, in reply, commented on the various cases cited, and contended that the *Southampton case* was not an authority against him, for it was stated in the report,

(1) P. & K. 234.

(2) K. & O. 72.

(3) K. & O. 411.

that the voter Sherry still kept his name over the door. There were, therefore, in that case, two points, 1st, whether there had been change of residence, and 2d, whether they could go into the case without having proof of the three questions having been put. The decision was that the vote was good, but the ground of the decision was uncertain.

1838.

The Committee resolved—That wherever the third question directed by the 58th section of the Reform Act, shall not be proved to have been put at the poll to the voter, his vote shall not be questioned by this Committee. (1)

A person who had acted as check-clerk on behalf of Mr. Forster, was then called to prove the putting of the third question in *Scott's case*, when Mr. *Austin* objected to the evidence of this witness being received. It appeared that a subscription had been entered into by the friends of Mr. Forster to defray the expenses of the petition, but that Mr. Forster had engaged to return all the subscriptions in the event of the petition being successful, and of his obtaining the seat; if however, the petition was not successful, the expenses of it were to be borne by the subscribers. The witness was one of the subscribers, and it was therefore insisted, that he was interested in the success of the petition, and consequently, disqualified as a witness.

The evidence of a person who had subscribed to the expense of a petition, and was to receive his subscription back, if the petition was successful, inadmissible.

The Committee resolved that the witness was disqualified. (2)

A deed poll was then put in, by which the witness, in the common form, released Mr. Forster and the petitioners, and all other persons from any claim which he had by virtue of such arrangement, as is before referred

(1) *Shaftesbury case*, *infra*, 366, and *Reading case*, *infra*.

(2) *Traloe case*, *ante*, 330. *Southampton case*, P. & K. 220.

1838. to, and after some discussion, the Committee resolved that his competency as a witness was restored.

THOMAS TAYLOR'S CASE.

This case was heard on Monday, March 20th.

The person who had acted as check-clerk on behalf of Mr. Forster at the booth where the voter had polled, was called as a witness to prove that the third question had been put to him, although there was no entry in the poll-book to that effect.

Mr. *Cockburn* contended, that parol evidence could not be admitted to prove any thing contrary to what appeared in the poll-book.

Mr. Serjt. *Merewether*, *contra*, said that this objection ought to have been taken at an earlier stage, if it was worth any thing; but he contended that the poll-book was merely a record of the names and descriptions of the voters, and of the parties for whom they gave their votes, but that as it was not the duty of the returning officer to make any insertion of the putting of the third question, the poll-book was not conclusive evidence on that point.

Mr. *Rushton* in reply.

The Committee resolved that the evidence of the check-clerk ought to be received.

Mr. Serjt. *Merewether* having on behalf of the petitioners, declined to protract the inquiry:—

The Committee resolved—That Francis Finch, Esq. is duly elected to serve in Parliament as a burgess for the borough of Walsall. That the petition of Thomas Pratt and others, electors for the borough, does not appear to the Committee to be frivolous or vexatious. That the opposition to the said petition is neither frivolous nor vexatious.

CASE XI.

SHAFTESBURY.

The Committee was chosen on the 15th of March, 1838, and consisted of the following members :

W. S. Blackstone, Esq. (Chairman) <i>Wallingford.</i>	
Lord Heniker,	T. Sheppard, Esq.
<i>Suffolk, East.</i>	<i>Frome.</i>
T. Hurt, Esq.	C. W. Codrington, Esq.
<i>Derbyshire, South.</i>	<i>Gloucestershire, East.</i>
Capt. F. Paget,	T. E. Winnington, Esq.
<i>Beaumaris.</i>	<i>Bewdley.</i>
Lord Worsley,	J. Blair, Esq.
<i>Lincolnshire (Lindsey).</i>	<i>Wigtown County.</i>
T. E. Elliott, Esq.	C. W. Packe, Esq.
<i>Roxboroughshire.</i>	<i>Leicestershire, South.</i>

Petitioners—

Electors in the interest of G. B. Mathew, Esq.

Counsel—

Mr. Harrison, Q. C., Mr. Joy, Q. C., Mr. Thesiger, Q. C. and Mr. Bellasis.

Agents—Messrs. Dorrington, Haywood, and Co.

Sitting Member—John Sayer Poulter, Esq.

Counsel—Mr. Hill and Mr. Cockburn.

Agent—Mr. Bishop.

The petitioners opened a case of scrutiny.

GEORGE MULLINS' CASE.

This voter was objected to under Class 4, the objections were :

1st. That he was not legally registered by the revising barrister.

2nd. That the list in which his name was inserted, was illegally delivered to the revising barrister, and illegally revised and signed by him.

A Committee will inquire into the regularity of an adjournment of the revising barrister's court.

1838.

3d. That the list in which his name was inserted, was not delivered by the revising barrister to the returning officer of the said borough.

4th. That the register in so far as it relates to the list in which his name was inserted, is null and void.

The town-clerk of Shaftesbury produced the original lists revised by the barristers, and by them delivered to the returning officer, from whom they were received by the town-clerk. All the lists, except the Stower Provost, bore date on the 24th October, 1836, the Stower Provost list bore date the 3d November, 1836. He also proved that in the autumn of 1836, notice was given in the usual way of the court for the revision of voters to be held on the 24th of October, on the morning of which day the court was held at the town hall.

The overseers of the parishes of Compton and Stower Provost did not attend at the morning court, and the court was adjourned to the Grosvenor Arms at 3 o'clock in the afternoon of the same day; at this adjourned court the overseer of Compton attended, but the overseer of Stower Provost did not, and when the time arrived for breaking up the court, there was a difference of opinion between the two revising barristers as to a further adjournment, but no adjournment was announced to the town-clerk. A few days afterwards the town-clerk received a letter from one of the revising barristers, fixing a court for Thursday, the 3d of November, for the purpose of signing the Stower Provost list, and inclosing a letter to the overseer, with a request that it should be forwarded to him. The revising barrister attended at Shaftesbury on the 3d of November, where the Stower Provost overseer appeared before him, and he signed the list, there being no name on it to which any objection had been sent in.

The overseer was called on behalf of the sitting mem-

ber, and produced the letter which he had received, dated 28th of October, 1836, containing the following expression: "I shall be in Shaftesbury on Thursday next, to which day I adjourned the court, and shall then sign the list of Stower Provost if you are there."

1838.

On this evidence, and after argument, the Committee

Resolved—That the court held at the Grosvenor Arms, on the 24th of October, 1836, was legally adjourned to the 3d of November, and therefore that the vote of George Mullins was good.

Mr. *Joy* at the next meeting of the Committee, applied on behalf of the petitioners for a re-consideration of the vote of George Mullins, on the ground that the decision was influenced by the expressions in the letter from the revising barrister to the overseer, which letter was not evidence in the absence of the revising barrister, and he proposed to examine the revising barrister before the Committee, if a re-hearing was granted.

Re-hearing
granted.

Mr. *Hill* opposed this application, and it was

Resolved—That the Committee will not preclude counsel from offering fresh evidence upon the remaining votes in Class 4.

Mr. *Bellasis* then applied to the Chairman to sign a letter which he had written to the revising barrister to attend, which letter contained a request to the revising barrister from the Chairman to attend before the Committee, as the Committee were desirous of having him examined, and it also contained a promise that his expenses of attendance should be paid by the petitioners.

Mr. *Hill* objected that no instance could be found of a Committee having expressed any desire of having a particular witness brought before them. The Committee could have no wish to have any particular evidence produced, but simply to adjudicate upon the evidence which came before them.

1838. *Resolved.*—That the letter could not be signed in its present form, but if an application should be made for a summons, the Committee would be bound to grant it.

The letter was then altered by the substitution of the words “as the counsel for the petitioners are desirous,” and in that form was signed by the Chairman.

ROBERT WARREN'S CASE.

He was objected to under Class 3, of which the following is the heading, “That he had not at the time of voting paid all rates due and payable by, and which had been duly demanded of him, between the 31st July, 1836, and the day of the said election. 2ndly, That he had not at the time of voting paid all rates due and payable by him as required by law.”

The Committee went into a case against a voter, although the three questions had not been put at the poll.

Mr. Hill asked if any proof was intended to be given, that the three questions required by section 58, of the Reform Act, were put at the poll, and on being answered in the negative, he objected that the vote could not be gone into; *Ipswich case*. (1)

The Chairman.—The report of the *Ipswich case* is not correct, the question there arose respecting a voter who had received parochial relief, and although there was a discussion in the Committee whether the voter could have answered the three questions, yet that was not in any respect the ground of the decision.

Mr. Hill.—In the cases of *Alefoundeu and others, Ipswich*, (2) the Committee have expressly incorporated the present point in their resolution, as one of the ingredients which led to their decision. *Canterbury, Edward Munn's case*, (3) and *Robert Barker's case*, (4) *Walsall case*, (5) and *Evesham case*. (6) Independently

(1) K. & O. 386.

(2) *Ib.*

(3) K. & O. 323.

(4) K. & O. 325.

(5) *Supra*, 358.

(6) *Infra*.

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of decisions it was most reasonable that the inquiry of the Committee should be confined to those cases, which had been questioned at the poll, one of the great objects of the Reform Bill being to simplify the law and to diminish expense. The reason for not inquiring into votes before a Committee which have not been questioned at the poll, stands on the same principle as the exclusion of all inquiry before Committees into votes which have not been disputed before the revising barrister.

Mr. *Thesiger*.—Votes cannot be questioned before a Committee which have not been disputed before a revising barrister, on account of section 60 of the English Reform Act, which by giving to Committees in express terms a qualified jurisdiction over the new tribunal which was created by that Act, by necessary implication excludes any greater or other jurisdiction.

The Reform Act instead of giving a new jurisdiction to the returning officer of making inquiries of voters at the poll, limits his old jurisdiction to the three questions contained in section 58, and there is no provision in the Reform Act giving a qualified jurisdiction over the returning officer to Committees of the House of Commons, but on the contrary, the old unqualified power of Committees over the returning officer, remains untouched by the Reform Act, either by express enactment or by implication.

These considerations completely dispose of the question as a point of law. Next as to the reason and expediency of the case. The questions in section 58 are not imperatively required to be put at the poll, the words are that the returning officer or his deputy, shall, if required, on behalf of either of the candidates, put the questions.

In the present case the petitioners are electors, are they to be precluded from an inquiry into the propriety of the voters being on the poll, unless the questions were put, over which they had no control?

There is also this absurd consequence which would

1838. follow from making the third question a preliminary to all inquiry by a Committee. In order for a person who has no qualification to find his way on to the poll without being liable to have his vote impeached it will be only necessary that his imposition should be conducted with sufficient skill to avoid raising suspicion. Whilst in every case where the third question was put even to a *bonâ fide* voter, the Committee will be at liberty to assume that he answered falsely, that he has subjected himself to penalties, and consequently, will inquire into his vote.

Again, if it is necessary that the third question should be put, it must be equally necessary that the first and second should be put. And if this be the case the voter may be personated with impunity, or the same voter may vote twice with impunity unless the three questions are put.

The same section 58, also enables the bribery oath to be put, and the same reasoning as is urged in support of the present objection, would lead to the conclusion, that unless the bribery oath has been taken, a Committee cannot inquire into the validity of the vote of a person who has been bribed.

As to the effect of the questions in section 58, the indictment for the misdemeanor of giving a false answer is so surrounded with difficulty and expense, as to make it almost practicably nugatory as a punishment; and the difficulty of the third question containing as it does a mixture of law and fact, makes it very desirable that it should not be pressed on all occasions.

Mr. Hill.—The administration of the bribery oath is merely ministerial, whilst the functions both of the revising barrister in adjudicating on disputed votes, and of the returning officer in adjudicating on the answers to the three questions are judicial. The returning officer may be called on to exercise great discrimination as to the answers which may be returned to the three questions. It is true that the most common answer

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would be a simple affirmative or negative, but the law prescribes no particular form for the answer, and when it is considered that a party subjects himself to an indictment for a misdemeanor, by giving a false answer, and that it is often difficult to decide in point of law, whether the qualification of a voter remains the same or not, it cannot be doubted but that a voter is entitled, at least, in answer to the third question, if not the others, to state the facts and leave it to the returning officer to determine whether such answer amounts to an affirmative or negative.

As to the difficulty which has been raised with respect to personation and voting twice, the inference which has been attempted to be drawn from them, is fallacious. If it be conceded that all the three questions must be put as a preliminary to an inquiry by a Committee; still, the absurdity is not greater than that which occurs in the ordinary case of a man's name being on the register, although he has no qualification. If a man had a good qualification as a 10*l.* householder, when his name was inserted on the register, he would, as the law now stands, lose his qualification by removing before the election to a 20*l.* house within the borough. But if a man is, without objection, entered on the register, as a 10*l.* householder, who never had a house, or any semblance of a qualification, no removal, no bankruptcy, no insolvency can take away his right to vote, as long as his name is on the register, though he never had any right to be on the register at all.

The question is not whether the enactment as to the putting the three questions is good or not, but as to the effect of that enactment. The law will not allow its own provisions to be called nugatory. The law says, use the means of investigation which are offered to you, but you shall not have the power of coming to the higher and more expensive court, unless you have taken the earliest

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and simplest means of obtaining justice. If you neglect the preliminary investigations you are precluded from all others.

Resolved.—That the objection cannot be sustained and that the case must proceed.

The voter was proved to have been registered as a scot and lot voter, he had voted for Poulter, and was objected to, for not having paid his rates.

One of the overseers of the parish of the Holy Trinity, Shaftesbury, for the year 1837, produced the rate-books for that year, and pointed out the rate for June, 1837.

Proof of signatures to a rate not necessary.

Mr. *Hill* objected to the rate being given in evidence, without proof of the signatures of the churchwardens and overseers, and of the justices who allowed it.

Resolved.—That the rate must be presumed to have been regularly allowed till the contrary is proved.

The voter's name appeared in the rate for the 24th June, 1837, the overseer Charles Blandford swore, that he had demanded this rate of the voter prior to the 26th July, the day of election, and that the voter had not paid it. In cross-examination he was asked if Henry Gatehouse, whose name came next in the list of votes objected to by the petitioners, had paid before the 26th July.

Mr. *Joy* objected to the question being put.

Resolved.—That no question could be put in cross-examination which might tend to vitiate or substantiate any other vote in the objected lists.

Vote struck off.

THOMAS BLANDFORD'S CASE.

A demand of a rate from the wife of a gardener held sufficient.

A scot and lot voter, voted for Poulter, objected to for non-payment of rates.

The voter was a gardener, and generally from home, the overseer, Charles Blandford, swore, that he had called before the 26th July at the voter's house, for the rate of

the 24th June, had seen the wife and demanded the rate of her. It was also sworn by the wife of the overseer, that some person whom she did not know, brought the money for the rate to her house on the 31st July.

1838.

Mr. Joy.—The voter being a person whose business generally calls him from home, a demand of the rate on the wife is sufficient.

Mr. Hill.—According to the authority of Lord Tenterden in the case of *Cullen v. Morris*, (1) this demand was not sufficient. It ought either to have been a personal demand, or a written memorandum should have been left at the house.

Vote struck off.

Two other votes were then struck off under the same head of objection, on the evidence of the overseer Charles Blandford.

HENRY GATEHOUSE'S CASE.

The overseer, Charles Blandford, swore that he had called on the voter for the June rate, before the election; that the rate had not been paid before the election, but that it was paid after the election, to his wife, on the 31st July. On his cross-examination, he said, that he did not give him any receipt.

An overseer who had given a receipt purporting on the face of it to be for the June rate, allowed to explain that it was meant for the May rate. (2)

The following receipt was then put into the voter's hand, which he admitted to be in his own handwriting:—"No. 3. Parish of Holy Trinity. Received the 10th of July, 1837, of Henry Gatehouse, five shillings and two pence, for Poor's Rates for Holy Trinity Parish, made the 25th of June, at 1s. 3d. in the pound.—5s. 2d. C. Blandford."

(1) 2 Stark. 577.

(2) The opportunity given for explanation on this occasion was perfectly proper, it is only noticed for the purpose of shewing more clearly the mistake made in *Belbin's case*, *infra*, p. 375, where no explanation was allowed.

1838. On being re-examined, he said that he had received the May rate from the voter, and must have given him a receipt, by mistake, for the June rate, dated the 25th of June; that there was no rate for the 25th June; but there was a rate 24th June, and another for the 26th of May, and he must have put, by mistake, 25th June instead of 26th May. That he received the May rate from several persons about the 10th July, and Gatehouse must have been one of the number.

He was again cross-examined, and a different receipt which he admitted to be in his own handwriting, and to have been given to Gatehouse, for the rate of the 26th of May, was put into his hand.

When asked to account for this, he at first gave no answer; he afterwards said he must have been mistaken, but eventually accounted for it by saying that it was his practice, when he expected rate-payers to call, to draw out receipts, filled up with sums and dates, and to leave them with his wife, to give to the rate-payers, when they should happen to call. That Gatehouse had told him he would call, but that he did not expect him to call on the 10th of July.

Vote held good.

Mr. *Hill* then applied to the Committee to reconsider the cases of the four voters whose names had been struck off the poll on the evidence of Charles Blandford. The ground on which he made this application was, that the Committee were now in possession of information, with respect to the credibility of Charles Blandford, which, if they had possessed it at the time of striking off those votes, would almost necessarily have produced a different decision.

Mr. *Joy* opposed this application.

Mr. *Hill* was about to reply, when Mr. *Harrison* interposed, and objected to his being allowed to reply, and

The *Committee* informed Mr. Hill that they were of opinion he had no right to reply; they then deliberated on Mr. Hill's application, and

1838.

Resolved—That the Counsel for the petitioners should proceed with their case.

The vote of Nathaniel Robbins was then struck off, on the evidence of Charles Blandford, who swore that he had demanded the June rate before the election, and of his wife, who swore that she had received the June rate from him after the election.

Mr. *Harrison* then stated that the revising barrister was arrived, and he proposed to proceed with a vote in Class 4.

CHARLES MEATYARD'S CASE.

Before the case was entered upon, the revising barrister stated that although he was willing to give any information in his power, for the purpose of assisting the Committee, and to do so under the sanction of an oath; yet he objected to be examined by counsel, and requested that all the questions might be proposed to him by the Chairman or some other member of the Committee.

Revising barrister called and sworn.

Mr. *Cockburn* objected to this course, and contended that the evidence ought not to be received at all, unless the party against whom it was brought forward had an opportunity of cross-examining.

After this question had been argued,

The *Chairman* stated to the revising barrister that the Committee felt themselves placed in a difficulty, with respect to the mode in which the evidence should be taken, and expressed a wish that he would relieve them from that difficulty, by waiving his objection. The revising barrister, in compliance with this request, consented to waive the

1838.

An informal adjournment of his court by a revising barrister will invalidate the lists revised by him at such adjourned court.

objection, but wished it to be understood he did so under protest.

The revising barrister was then examined, and after his evidence had been gone through, the case was argued at considerable length.

Mr. *Harrison* relied on the evidence of the revising barrister, to show that there had been no adjournment, and he contended that this rendered all the proceedings of the 3d of November nugatory. Mr. *Hill* argued, on behalf of the sitting member, that the act of the revising barrister had been merely ministerial, and not judicial, and that, as the list came before the Committee apparently regularly signed on the face of it, the Committee were not justified in making any inquiry into the mode in which the list had been revised. It was further contended that, even if the Committee should decide that the list was bad, the voters ought not to be prejudiced by the act of the overseer or revising barrister, but ought to be allowed to prove their right to vote before the Committee, *Wilmot Gaunt's case, Droitwich*. (1) Lastly, it was insisted that, on the evidence of the revising barrister, the court was well adjourned. That it was preposterous to require the solemnity of a formal adjournment for each rising of the revising barrister's court, and that there had been an adjournment in this case, the only defect being that no day was mentioned at the time of the rising of the court, for holding the adjournment.

Resolved.—That the court held at the Grosvenor Arms, on the 24th October, was not legally adjourned to the 3d November, and that the vote of Charles Meatyard should be struck off the poll.

Nineteen votes, similarly situated, were then struck off from the poll of the sitting member, and ten votes from

(1) K. & O. 57.

that of the petitioner, which placed the petitioner in a majority of nine. 1838.

JOHN BELBIN'S CASE.

Registered as a scot and lot voter; voted for Mathew; objected to for non-payment of rates.

An overseer, who in passing his account, had charged himself with having received the whole rate, not allowed to explain the account.

It was proved by the overseer, that John Belbin was a shoemaker; that his wife was applied to at his house three times, by the overseer, for the payment of the May rate, before the election; that the voter had stated, before the barrister, that he allowed his wife to pay rates and taxes; the wife paid the overseer the May rate on the 5th August, 1837. The vote was rejected at the registration of 1837.

Mr. *Joy*, on the cross-examination of this witness, called for the parish receipt and expenditure book, and on its being produced, it appeared that the accounts of the quarter ending Midsummer, 1837, were audited on the 14th July, 1837, and that the overseer, in passing his account had debited himself with the whole amount of the poor rate.

Mr. *Cockburn* in re-examination, ascertained from the witness that it was the constant practice of overseers to debit themselves with rates which they had not actually received. And he asked the witness what arrears were due at the time of the audit?

Mr. *Joy* objected to the question. The audit-book which has been produced, shews that all the rates have been paid, and the book cannot be contradicted by parol testimony.

Mr. *Cockburn*.—The mere act of the overseer choosing to give the parish credit for the sum as received, and entering the full sum in the audit-book, could not discharge all the individual rate-payers who were in arrear from their responsibility to pay. If the overseer had actually

1838.

given a receipt to the voter himself, he might have brought evidence to contradict the receipt. In *Gatehouse's case*, (1) a receipt had been given by Blandford to Gatehouse for the June rate, and the Committee allowed the voter to attempt to contradict the receipt, by swearing that the receipt was intended to apply to the May rate. The opportunity of explanation allowed on that occasion was perfectly right, but it was conclusive as to the propriety of the present question.

Mr. *Joy* was heard in reply.

Resolved.—That the question cannot be put. (2)

Vote held good.

This closed the case on the scrutiny, leaving the petitioner in a majority of nine.

Mr. *Hill* then opened a case of treating with a view of disqualifying the petitioner, and making the election void, and he stated that the agents for the petitioner, Mr. Buckland and Mr. Chitty, would be involved in those charges, for which reason he wished them to withdraw, and referred to the *Hull case*, (3) where the agent, Mr. Crocknell, was not allowed to remain in the room during the inquiry.

Resolved.—That Mr. Buckland and Mr. Chitty should withdraw from the Committee-room during the examination of any case in which they are personally implicated.

Charge of treating against petitioner.

Mr. *Hill* stated that he should be enabled to prove one of the clearest and most complete cases of treating, that ever had been presented to a Committee. He should

(1) *Supra*, 371.

(2) We have heard that this decision gave rise to considerable apprehension amongst overseers, on the ground that, if it were law, it would preclude them from enforcing any arrears of rates, after they had debited themselves with the full amount of the rate in their account with the parish. There is, however, no ground for the alarm, the decision is not law, and the only object of reporting it, is to call attention to a misapprehension, which if uncorrected might be injurious.

(3) K. & O. 430.

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prove that there had been extensive and general treating, both before and after the teste of the writ, that a number of public houses had been opened, day after day, to which voters had resorted, and ordered whatever refreshments they chose; that the publicans had been paid for these entertainments by Messrs. Buckland and Chitty, out of money lodged by Capt. Mathew in the Shaftesbury Bank, and that Capt. Mathew had distinctly avowed that Messrs. Buckland and Chitty were his agents for the purposes of the election. In addition to this he should prove that a series of entertainments had been given by Capt. Mathew to voters, at the inn at which he staid, and particularly, a breakfast on the morning of the nomination, and another on the morning of the election, at all of which he was himself personally present, and for all of which he paid.

With respect to the treating, he should principally rely on those acts of treating, which took place after the teste of the writ, for although treating before the teste of the writ is sufficient to avoid an election, yet it is so, only in the case of the Committee being satisfied that it was done with the intention to corrupt. And although, if the same rules of judgment are to be applied to decisions, on matters of elections, as are universally recognised in all the other relations of life, no doubt whatever can possibly be entertained of the corrupt intention; yet it must be admitted that evidence of intention, never can be so cogent and irrisistible as evidence of positive facts. It was for this reason that he should rely with more confidence on that part of the treating, which happened after the teste of the writ, than on that part which preceded it, for the mere proof of the existence of treating, after the teste of the writ, would be fatal to Capt. Mathew's claim of the seat, and no discretion would be left to the Committee, to say with what intention the treating had been given. It was hardly necessary for him to state that treating was as

1838. fatal to Capt. Mathew's claim of the seat, where he came before the Committee as a petitioner, as it would have been if he had been defending the seat as sitting member. His case would be, that there had been extensive treating, and that it had been sanctioned and paid for by Capt. Mathew, and whether he had ordered it or not, would be altogether immaterial.

The clerk of the Crown Office produced the writ, which was dated the 17th July, 1837.

It was proved that Mr. E. C. Buckland, and Mr. P. M. Chitty, were agents of Capt. Mathew, (1) that two sums, one of 1000*l.* and the other of 400*l.* were paid into the bank of Messrs. Brodie, King, and Smith, of Shaftesbury, on account of Capt. Mathew, the first on the 26th July, 1837, the day of the election, the other on the 3rd October, 1837.

That the money was drawn out by checks of Capt. Mathew, and Mr. Buckland, and that the balance of the 1000*l.* was transferred in September, at Capt. Mathew's request, to an account, in the joint names of Messrs. Buckland and Chitty, "on account of Mathew's election."

It was proved that Capt. Mathew lived at the Grosvenor Arms, Shaftesbury, from the beginning of July, to the election, that gentlemen of the town and neighbourhood, some of whom were voters, dined with him daily. That a breakfast was provided in his room on the day of nomination, for eighty persons, some of them voters. That a breakfast and luncheon were provided in his room, on the day of election, for two hundred persons, some of them voters. That several public houses were opened during a great part of the month of July, some to within three days of the election, when the precept was read, others up to the election, that at those houses a great number of voters were

(1) See printed Minutes of Evidence

entertained gratuitously, that the bills of the publicans, who so opened their houses, were sent into Mr. Buckland, and Mr. Chitty, by the direction of Mr Buckland. That payments were made to the landlord of the Grosvenor Arms, and to each of the publicans who so sent in their bills, out of the 1400*l.* deposited at the bank ; that such payments were made on account of such bills, that some deduction was made from the full amount of each of such bills, and that in one case the deduction was expressly stated to have been for discount, that no reason was assigned for the deductions in the other cases.

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Several of the publicans were called, who proved that a system of treating was extensively and openly carried on, during the whole month of July, up to the election ; that they had all received payment on account of such treating by checks on Messrs. Brodie, Smith and King, which checks were paid out of the 1400*l.* above mentioned, it also appeared that they had not received any express orders from any one to open their houses.

Several attempts were made on behalf of the sitting member to serve a Speaker's warrant on Mrs. Edwards, the landlady of the Grosvenor Arms, for the purpose of getting her attendance as a witness, but these were rendered ineffectual by her keeping out of the way.

Mr. *Cockburn* having brought evidence to shew that Mrs. Edwards was kept out of the way by contrivance, applied to be allowed to put in evidence the account books of the Grosvenor Arms, which were kept in Mrs. Edwards's handwriting.

This application was refused.

Mr. *Cockburn*, in summing up the evidence, directed the attention of the Committee to two points,—1st, whether the existence of treating had been proved ; 2nd, whether it had been connected with Captain Mathew. With regard to the first question, the witnesses had

1838. proved indisputably the existence of treating both before and after the teste of the writ. It was true that some of the witnesses were in a humble station of life, but there had been nothing whatever to shake their credit and the circumstance that many of the witnesses were the very publicans themselves, in whose houses the treating had been carried on, who were interested in keeping up the system, and who had been paid out of money lodged in the bank by Captain Mathew, made it quite certain that their description of the treating complained of would fall short of the truth instead of exceeding it. It is admitted by all the publicans, that a general system of treating was carried on up to the time of the reading of the præcipe, which was some days after the teste of the writ, and that some of the publicans carried on the treating down to the very day of the election, but it is unnecessary to press this part of the evidence, as all agree that the treating continued long after the teste of the writ on the 17th of July. As no assignable ground could be brought forward for doubting the evidence of the publicans as to the existence of the treating, and as their testimony was unanimous as to its having taken place without check up to the reading of the præcipe, which was four days before the election, and therefore, long after the teste of the writ, it became unnecessary to inquire with what intention the treating had been carried on, he should therefore assume, that such a system of treating had been proved as would be fatal to Captain Mathew's claim of the seat, provided the evidence were sufficient to connect Captain Mathew with the treating.

With regard to the second question, it was certainly true that Captain Mathew had not given orders for the treating, but he had paid for the treating, and having recognised, sanctioned, and adopted those acts, it became perfectly immaterial whether he had originally ordered

them or not. The principle *omnis ratihabitio mandato priori æquiparatur* (*Paley's Principal and Agent*) rendered Captain Mathew's adoption of these acts equal to a prior authority. The bills were paid by Messrs. Buckland and Chitty out of money deposited by Captain Mathew in the Shaftesbury Bank for the purposes of his election. No attempt had been made on the other side to deny that Messrs. Buckland and Chitty were the authorized agents of Captain Mathew, indeed such an attempt would have been useless after Captain Mathew had been proved to have said, "I am in the hands of my agents Messrs. Buckland and Chitty."

1838.

To state the case shortly, the existence of treating has been proved, this treating has been adopted and paid for by Messrs. Buckland and Chitty, and Captain Mathew has expressly acknowledged that Messrs. Buckland and Chitty were his agents. What will be the answer to this case? Possibly it will be said, that the bills were not paid in full. But it is well known that election bills rarely are paid in full, and even if it were possible in any single instance to explain away the part of the treating, which was subsequent to the teste of the writ, yet this would not apply to all the cases, for one publican has expressly said that the deduction was for discount, and not one of them has pretended that the deduction was in respect of the treating subsequent to the teste of the writ. He was not aware of any other answer which could be attempted. But even if the petitioners should succeed in suggesting any explanation to get rid of the connexion of Captain Mathew with the general treating, it would be clearly impossible for them to explain away the personal treating by Captain Mathew, consisting of the dinners, luncheons, and breakfasts, given by him to voters at the Grosvenor Arms, and this alone must prove fatal to his claim of the seat.

1838. Mr. *Thesiger*, in his reply, complained of the mode in which the inquiry had been conducted. The inquiry was one which never ought to have been commenced, and which if commenced, ought not to have been vexatiously protracted. The parties assailing Captain Mathew appeared to have forgotten, that it lay on them to prove affirmatively and clearly the charge which they had brought forward. Instead of doing this they had presented a case so loose and unconnected, that he was fully entitled to treat their charge as utterly unfounded and frivolous. The object of the Treating Act of 7 Wm. IV. c. 4, s. 1, was to prevent a candidate from treating, either personally or by his agent, after the teste of the writ, *in order to be elected*.

These expressions at the end of the sections qualify the whole which precedes them, if it were otherwise, a single invitation of a voter to dinner would vitiate an election. It is trifling to talk of the dinners given by Captain Mathew at the Grosvenor Arms; Captain Mathew lived for three weeks with two friends, and horses and servants at the Grosvenor Arms, and supposing that the result of the minutest inquiry which had been instituted, should be to establish that, during all this period, some voter had sat down to dinner with Captain Mathew, could it seriously be contended that such proof would be sufficient to vitiate Captain Mathew's election. A great deal of stress has been laid on the breakfast at the Grosvenor Arms, but it has not been proved that any voter actually partook of that breakfast. On this part of the case the whole question is, whether Captain Mathew has been proved to have treated any person having voice or vote at the election in order to be elected. And looking to the meagerness of the proof, and to the presumption which in all cases was to be made in favor of innocence till the contrary was established, he felt that

the party who preferred this charge had wholly failed to establish it.

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The only other part of the case is the opening of the public houses and payment of their bills. It is admitted that these houses were not opened by Captain Mathew's orders, it is not proved that either he or his agents knew that the houses had been opened till after the election was over, and the whole case attempted to be made out, is proof that Captain Mathew's agents paid part of the bills. Nothing can be more meager or miserable than the details which have been given by the witnesses produced in support of this part of the case. And when the character of those witnesses was considered, it would not be too much to expect that every statement made by them should be watched with the utmost jealousy. It would be most material to bear in mind, that no one of the publicans who had been brought forward had been paid in full for the provisions which he had supplied. And it would be but just in the Committee, before they adopted the assertion made on the other side, that the publicans were in the interest of the petitioners, to consider that each one of the publicans who had been called, was dissatisfied with Captain Mathew for having made a deduction from his bill, which doubtless appeared unreasonable to the publican. The case made out on the other side was, that Captain Mathew had become guilty of treating by relation; not that he or his agents had been guilty of any act of treating before the election, but that his agents by paying as a gratuity subsequently to the election, sums of money to certain publicans, to none of whom were they bound to make any payment at all, thereby vitiated the election, which up to the moment of such payment was quite unimpeachable. There is something quite original in this novel extension of the doctrine of guilt by relation. If it were adopted, what limit could be imposed

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to the liabilities of candidates? It would be of no avail that a candidate had preserved himself and his agents from the commission of any illegality up to the time of the election, some disappointed underling, even after he had ceased to be an agent, might still avoid the election by ratifying the illegal act of a perfect stranger. In charges of this kind, the party accused is not to be found guilty upon vague presumption, a clear case must be made out. What is the case made out against Captain Mathew? That his agents asked for and paid certain bills. It is true that those bills were asked for by Captain Mathew's agents, but it is equally true that in no single instance was any one of those bills paid in full.

If the items disallowed in the bills of the publican, were those which related to the treating after the teste of the writ, the whole case against Captain Mathew falls to the ground. If it is not for Captain Mathew to prove that the deductions were made in respect of the illegal items, it has been shewn that deductions were made, and it will be presumed in favor of innocence, that the illegal parts were rejected.

Resolved.—That J. S. Poulter, Esq. was not duly elected for the borough of Shaftesbury; that G. B. Mathew, Esq. was duly elected for the said borough; and that neither the petition nor the opposition to it were frivolous or vexatious.

A Special Report was made upon the treating, the non-production of evidence, and the case of the Stower Provost voters.

CASE XII.

YOUGHAL.

This Committee was appointed upon February 22, 1838, and consisted of the following Members :

General the Hon. Henry Beauchamp Lygon (Chairman), <i>Worcestershire, W.</i>	
Charles Whitley Deans Dundas, Esq. <i>Flint.</i>	Lord Ernest Augustus C. Bruce, <i>Marlborough.</i>
Hon. John G. Charles Strangeways, <i>Dorsetshire.</i>	Hon. Anthony Henry Ashley Cooper, <i>Dorchester.</i>
Richard Walker, Esq. <i>Bury.</i>	Lord Northland, <i>Dungannon.</i>
Earl of Surrey, <i>Sussex, West.</i>	Marquess of Granby, <i>Stamford.</i>
Charles J. Standish, Esq. <i>Wigan.</i>	John Young, Esq. <i>Cavan County.</i>

Petitioners—

Electors in the interest of Mr. Nicol.

Counsel for the Petitioners—

Mr. D. Pollock, Q. C., Mr. Thesiger, Q. C., and Mr. Walpole.

Agents for the Petitioners—Messrs. Jackson and Johnson.

Sitting Member—Frederick John Howard, Esq.

Counsel for the Sitting Member—

Mr. Harrison, Q. C., Mr. Biggs Andrews, Q. C., Mr. Austin, and Mr. Close:

Agent for the Sitting Member—Mr. Baker.

The petitioners, in their statement, alleged an intention of bringing forward charges of bribery against the sitting member, and of entering into a scrutiny. The form of the statement contested, *infra*.

The following was the list of objections delivered in on the part of the sitting member, and which contained similar objections to those contained in the list of the petitioners.

Class No. 1. Objected to as bad, illegal, and invalid votes, for that the said voters did not, respectively, hold and occupy, within the said borough, any house, &c., of

1838. the clear yearly value of not less than 10*l.*; for that the property in respect of which the said voters respectively registered and voted, was not of the nature and value prescribed by the Act 2 & 3 W. IV. c. 88, and that they had not occupied the premises in respect of which they were registered, for six calendar months previous to the time of their respective registry.

Class No. 2. objected, for that they, at the time of voting, had ceased to hold and occupy the premises in respect of which they had severally been registered, and that their qualification did not continue at the time of polling.

Class No. 3. objected to, for that they did not hold and occupy, as tenants or owners, any house, &c., to entitle them to be registered, or to vote at the said election.

Class No. 4. objected to, for that they personated voters.

Class No. 5. objected to, for that they were, at the time of the said election, in arrear for more than one half-year's grand jury or municipal cesses, &c.

Class No. 7. objected to, for that they were bribed.

Class No. 8. objected to, for that they were, within six calendar months previous to such election, or within fourteen days after such election, employed for the purposes of the election, and paid.

Class No. 9. objected to, for that they bribed electors.

Class No. 10. objected to, for that they were elected or admitted as freemen of the borough, by grace especial, before the passing of the Reform Act, but were not sworn or admitted, nor did they pay the stamp duty, payable on admission, until after the passing of the said Act, and were not, therefore, freemen entitled to be admitted to register for the said borough.

Class No. 11. objected to, for that they had been employed in the Stamp-office, Post-office, Customs, or Excise, and were, therefore, disqualified by Act of Parliament

from voting at the said election, and whose votes ought, therefore, to be struck off the poll. 1838.

Class No. 12. objected to, as not being freemen, but admitted in fraud and for election purposes, and on pretended rights of freedom.

Class No. 13. objected to, as not legally admitted or sworn as freemen.

Class No. 14. objected to, for not being freemen at the time of polling, residing within seven statute miles of the usual place of election, within the said borough, as directed by the Act 2 & 3 Wm. IV. c. 88. (1)

Class No. 15. objected to, as having been admitted freemen in batches, and not singly.

Class No. 16. objected to, as having no affidavit of registry, or defective and invalid affidavits.

The number of electors polled for Mr. Howard, was 158; and for Mr. Nicol, 150. The poll-books, together with the usual affidavits, were produced by the town-clerk of Youghal, and were received without opposition.

Mr. *Harrison* applied to the Committee, to require the Mayor of Youghal to produce the charter of the borough. The defence of the sitting member chiefly depended upon his impugning the title of certain freemen who were polled at the last election, and the charter was a necessary document for him to have produced. The Mayor, before he left Youghal, had been served with a notice to bring with him all public books, documents, records, minutes, notices, memorandums, papers, and writings whatsoever, in his custody or possession, relating to the voters of the said borough, or to the title of any party to vote at the last

(1) Class 8, of the list of the petitioners, contained the names of voters who were objected to, "for that the premises in respect of which they, and each, and every of them claimed to be registered, and were and was registered at the last election, were not within the limits of the borough of Youghal." A case under this class failed in consequence of its not being alleged that the party objected to "voted."

1838. election. It was found, upon the arrival of the Mayor, that he had not brought the charter with him, and it was, therefore, asked that the Chairman would make a peremptory order for its production.

Mr. Thesiger.—A notice to produce this charter was only served on the day on which the Committee was ballotted for. It was given too late. If a particular document is required, which may be specified and named, the notice to the party who is to produce it, ought to be served upon him before he leaves his place of residence, *Doe d. Curtis v. Spitty*. (1) After the returning officer has arrived here, the order asked for cannot be made. But the notice served upon him before he left Youghal, and which has been referred to, was insufficient, for under the word "records" the charter could not have been supposed to have been included. The summons was vague, indefinite, and general, and was, therefore, bad. The charter was a known document, and if it was required, it ought to have been pointed at by its proper name. If the officer has neglected to bring with him the proper documents, he has been guilty of contempt, but will it be said that any contempt has been committed? The summons does not refer to the documents of the corporation, but merely to such as relate to voters.

Mr. Harrison.—Under the summons, the mayor ought to have brought with him the charter. He knew the title upon which the right of the freemen to poll depended, and that the charter was a necessary record in this case. With this knowledge, his neglect to produce it, is an evasion of the order made upon him.

The town-clerk was then asked by the Committee, if he had had any copy of the charter with him. He replied, that he had both a Latin copy, and a translation of it.

(1) 3 B. & Adol. 182.

It was then asked, if the summons served upon the Mayor at Youghal, was in the ordinary form of those issued in similar cases. Mr. *Harrison* replied that it was.

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It was resolved, that the charter should be produced.

It was then agreed, that instead of applying to the Committee for an adjournment, to enable the charter to be obtained, the copies in the possession of the petitioners should be used, if an attested copy, ordered on the part of the sitting member, should not arrive in sufficient time; Mr. *Thesiger* remarking that there was no ground for the application that had been made to the Committee, if an attested copy of the charter could be produced.

At the next meeting of the Committee, (Monday, February 26.) Mr *Harrison* stated, that in consequence of a fall of snow, upwards of forty witnesses, who had been ordered to leave Youghal, and were supposed to have left it upon the previous Wednesday, had not arrived, and he, therefore, requested an adjournment until the next day.

Mr. *Pollock* opposed the application, but finally consented to it, upon its being offered, upon the part of the sitting member, that the petitioner's costs of the day should be paid.

After a short deliberation, the room having been cleared, the Chairman announced, that the Committee, under the circumstances, would adjourn, but upon the express understanding, that the case should be proceeded with upon the next day, whether the witnesses should arrive or not.

HENRY KEATING'S CASE.

This voter was registered in October, 1832, in respect of a house held by him, at an annual rent of nine pounds. Falling into arrear of the rent, a decree of possession was obtained by his landlord, in the Civil Bill Court, upon September 21, 1835, and a warrant to give possession was

1838. issued upon October 7, 1835. The warrant was executed, without difficulty, at about twelve o'clock of the 31st of October, and every person was put out of the house, together with all the goods and implements of the trade of the voter. The house was locked up, and the key delivered to the agent of the landlord. Upon the same day, the following agreement, for the occupation of the same house, was made and signed by the voter. "I propose to take from A. Fisher, a house near the Custom Quay, at the rent of fifteen shillings per month, to be paid in advance, and I agree to give him up quiet and peaceable possession, whenever this runs in arrear. Youghal, October 31, 1835, Henry Keating." Under this agreement the voter entered into the possession of the house the evening of the day upon which he had been ejected from it. The objection to his vote was, that he had ceased to occupy the premises in respect of which he had been registered.

After hearing counsel, the vote was held good. (1)

JOHN CLARKE'S CASE.

What is a sufficient occupation to preserve the right to vote.

This voter was objected to in Class 2, of the list of the sitting member. He rented the house for which he was registered, and paid rent for it until November 1837. In June, 1837, he removed all his furniture, except two chairs, and let the greater part of the house to one Elizabeth Andrews, to whom he gave permission to use the rooms of the house not let to her. A bill was put into one of the windows, stating, "This house to let." Mrs. Andrews continued in possession until after the election. Upon one occasion, in her absence, the voter entered the house through a window, and though she was not pleased at his having done so, she made no complaint. The voter who had taken, and

(1) See *Snell's case*, *Ipswich*, *supra*, 278. *Coleman's case*, K. & O. 447.

occupied another house, near Youghal, sent a bed into the house in question, and slept in it during the election.

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On the one side it was contended, that the voter had ceased to occupy the house, and had, therefore, lost his right to vote; and on the other, that the occupation continued, part of the furniture of the voter being left in the house, and he possessing the right to enter the house whenever he pleased.

The vote was retained upon the poll.

THE REV. JOHN BORTON GREY'S CASE.

The voter was an officiating clergyman in Youghal, and the following agreement, to let the house for which he was registered, was made by him:—" I agree to let my house to R. Deeves, Esq., for three months, at thirty-six guineas; or three months and a half at forty guineas, commencing from the 15th of the present month of June, reserving to myself the use of the study. J. B. Grey. June 6, 1837." Mr. Deeves entered into possession of the house under this agreement, and by a verbal permission from Mr. Grey, had the use of the study that was reserved. Within a few days after the date of the agreement, Mr Grey left Youghal and did not again enter the house until the possession of it was given up in September, 1837, but during his absence some additional furniture was put into it by his order.

What is a sufficient occupation to preserve a right to vote.

After hearing counsel, it was resolved, that the name should be retained upon the poll.

NICHOLAS GEORGE GREEN'S CASE.

This voter was objected to, upon the ground of having ceased to occupy the premises for which he was registered, and, also, upon account of his having been an insolvent debtor, since the time he was registered, but the first objection

What not sufficient occupation to preserve right to vote.

1838. only, was insisted upon. The voter registered in October, 1832. At that time a Miss Hastings occupied part of the house for which the voter registered, and paid rent to him. In 1835 he became insolvent, and an execution being put into the house, it was agreed between him and Browne, his landlord, that Miss Hastings should in future pay her rent to Browne, and that the voter should only pay rent amounting to about 12*l.* a-year, for the part of the premises actually occupied by him. The voter was never disturbed in his occupation, and continued, after this new agreement, together with Miss Hastings, to occupy the same parts of the house as they did in 1832. He paid the local and county cesses for the entire house.

Mr. *Walpole* contended, that a part only of the premises, in respect of which the voter had registered in 1832, having been demised to him in 1835, he had lost his right to vote.

Vote struck off.

JOHN LEWIS JOHN'S CASE.

What sufficient
occupation to
preserve right
to vote.

The voter was objected to under Class 14, in the list of the sitting member. He was registered as a freeman, and lived in the family of his cousin Mr. M'Clure, to whom he acted as a clerk, and whose brother carried on business at Cork. In September 1835, Mr. M'Clure, of Cork, was taken ill, and the voter was sent to Cork to superintend his affairs, under an arrangement that he was to receive part of the profits of the business. In case Mr. M'Clure recovered, the voter was to return to Youghal. The voter took lodgings at Cork, at a rent of 26*l.* a-year, with leave to quit them at a month's notice. He remained in them for seventeen months, and finally left them in April 1837, it being determined that the business at Cork, should be given up in consequence of the continuation of the illness of M'Clure. At the time when the voter left Youghal,

he occupied a room in his cousin's house, which was chiefly furnished with his own furniture, and which he held as one of the family. His furniture remained in this room while he was at Cork, and in his visits to and fro, which amounted to between twenty and thirty in the year, he slept in the room, and upon his final return to Youghal occupied it until Christmas 1837. In June 1837, he was elected treasurer of the corporation of Youghal, and in July of the same year, he was admitted as a stranger or visitor to the news-room of the town; but the subscriptions for the year were payable in August, and he became an annual subscriber to the rooms in that or the following month.

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Mr. Pollock.—In support of the vote:—

The admission to the news-rooms was evidently an indulgence, in order to prevent the necessity of paying two subscriptions for the year; one in July and another in August. When the voter went to Cork, it was agreed, that he should receive a share of the business as the most convenient mode of payment and as best calculated to stimulate his industry. But he was never permanently engaged at Cork. He went backwards and forwards, always expecting a termination of his engagement, which entirely depended upon the state of the health of M'Clure. When at last, it appeared that the illness of M'Clure was incurable, the business was thrown up, and he returned to Youghal. Temporary circumstances had kept him away, and the moment they ceased, he went back to his former quarters. *Andrew Brett's case.* (1) The residence of the voter was at Youghal. He retained a room there in which his furniture remained, during his absence, undisturbed, and he never permanently quitted it.

Mr. Andrews.—The room occupied by the voter at

(1) Cor. & D. 227.

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Youghal was simply occupied by the permission of his cousin. He had no right to enter it, he could not enforce admission into it, and he had no residence that he could call his own. The trade in which he was engaged, kept him from Youghal for upwards of fifteen months, and he was compelled to be resident at Cork during the whole of that time. Suppose that he had been a freeman of Cork, duly registered? Could he not have voted there? If so, how can his vote at Youghal be supported? If he had been resident at Youghal, he would have been liable to have been balloted for, and might have been called upon to serve the office of constable, but could this voter have been required to discharge the duties of these offices? In Cork, and in Cork only, they could have been imposed upon him. What limit is to be placed to the duration of absence that shall not affect the vote? If it had extended to five years, instead of to fifteen months, it must still be contended, that the right to vote continued. What had the voter to do at Youghal? His business, his occupation, the pursuit out of which he gained his living were at Cork. There he had his lodgings, there only he had a residence that he could truly call his own, there he had a home legally and exclusively belonging to him. When he returned to Youghal he was treated as a stranger. An indulgence was granted to him by his admission into the news-rooms, but it was an indulgence granted to him as a stranger, and which would not have been extended to a resident, however inconvenient to be called upon to pay the amount of an annual subscription in two consecutive months. Upon his return, he did not engage in his old employment, but filled a new character and was elected treasurer of the borough. These facts conclusively show, that the residence ceased for a time. The case cited is one of inhabitaney, which differs from residence. Inhabitaney

and residence are distinguishable grounds of qualification. (1)

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Vote held good. (2)

JAMES BOLES JOHNSON'S CASE.

This voter was objected to in Class 14 of the list of the sitting member. (3) He lived at a place called Kil-leagh, and the distance from his residence to the courthouse at Youghal, where the elections are held, was seven miles, three furlongs, and thirty-six perches, by the coach-road—seven miles, one furlong and twenty perches, by Windmill-lane; and seven miles, two furlongs, and eight perches, by which is called the Cork Road. It was admitted, that if the distance was measured in a straight line, instead of by the nearest public way, it would be about six statute miles. (4)

Distance of seven miles prescribed by Reform Act, to be measured in a straight line, and not by the nearest public way.

Mr. *Andrews*.—The 2 & 3 W. IV. c. 88, s. 9, enacts that freemen who, by reason of any corporate right, are entitled to vote at the election of members to serve in parliament, shall continue to enjoy that right of voting, “so long only as they shall reside within the said city, town, or borough, or within seven statute miles, of the usual place of election therein.” If the voter resides beyond the seven miles, however small may be the excess of distance beyond it, he loses his right to vote. The object of

(1) See *Rex v. Serjeant*, 5 T. R. 466.

(2) It was considered, by a considerable majority of the Committee, that the return of the voter was kept in suspense by the illness of M'Clure.

(3) There was a second objection to this voter under Class 11, which was entered upon after the question in Class 14, was disposed of. He had resigned the office of sub-deputy-postmaster on July 1, 1837, but the resignation not having been made twelve months before the time of voting, the vote was struck off the poll.

(4) According to the Reform Act the measurement must be by statute miles: 5½ Irish miles equal seven English, or 11 Irish miles equal 14 English.

1838. the enactment was to prevent the expense of bringing up non-resident freemen to the poll, and to put an end to corrupt proceedings which were the excuse for the payment of the expences of voters. In limiting the distance it was clearly intended that the measurement of it should be by a road that should be traversable. If it were not so, places which from the inequalities of the ground and the necessity of circuitous roads, can only be reached by traversing a distance much exceeding seven miles, will be brought within the seven miles measured in a straight line, and the very inconveniences and expence that the act provides against will be produced. In *Woods v. Dennett*, (1) the defendant had engaged not to carry on the trade of a cheesemonger within a distance of one mile from the plaintiff's shop, and Lord Ellenborough held, that the principle for estimating the distance, was by the shortest way of access by the foot-path. In *Leigh v. Hinde*, (2) the assignor of a lease had covenanted not to keep a public-house within the distance of half a mile from the premises assigned, and it was held that the distance was to be measured by the nearest way of access.

Mr. *Thesiger*.—This question has never yet been decided by a Committee, and there is a great conflict of opinion upon it among revising barristers. It must be admitted, that the voter lives beyond seven miles from the borough by the nearest road from the place of polling, and that it is a matter of indifference if the seven miles is exceeded by one perch or one furlong. In this case, the dwelling of the voter is within seven miles, if the distance from the place of polling is measured in a straight line, and it is beyond seven miles if measured by the nearest road.

Though no decision upon the subject has been made in England, it came under the consideration of Baron Foster,

(1) 2 Starkie, 89.

(2) 9 B. & C. 774.

in Ireland, at the Waterford Summer Assizes in 1832, who held, that the seven miles were to be measured by a mathematical line, or, as it is popularly expressed, "as the crow flies," without reference to the road or roads of access. (1)

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Good sense would determine this to be the best opinion. It fixes a certain and invariable distance, easy to be ascertained, and never changing. The test is one which applies to the end of time. If a straight line, or as it is sometimes popularly called, a line drawn as the crow flies, is taken, the district within which voters must reside, is determined at once. The man who is within seven miles of the borough to-day, will be within that distance to-morrow. But if the distance is to depend upon paths and roads, upon rights of way which may be permissive merely, the franchise will vary with every diversion of them, or with the suspension of any privilege connected with their enjoyment. A public path may be rendered less direct than it is, and its change of direction may have a material effect upon the franchise. But the legislature must be presumed to have intended to lay down an unvarying rule, and permanently to have fixed the circle around each borough which should constitute an electoral district. Convenience requires such a rule. It will produce certainty; every person will be informed of his right to vote, and those who are not entitled, will always be readily pointed out. Let the distance be measured by paths, by rights of way which may be given to certain places in order to turn the scale of an election in a particular way, how can it be always ascertained who really are voters living within seven miles of the borough? Each case will be made to depend upon considerations, not affecting all the voters in common, but upon such as

(1) *Alcock's Reports*, 1, n.

1838. are of a merely personal nature. Whim, caprice and favor may give a right of way to the inhabitants of a particular village, and upon this right the exercise of the franchise may be made to depend. It will be far safer and far more just, to make the distance certain, by laying down a rule, which no person can vary. The cases cited relate to covenants in restraint of trade, and are completely answered, by observing the principle which governs their construction. The intendment of the law is against the party making the covenant. It is for the benefit of the public that the strictest rules of construction should be applied to such agreements. But in cases of this kind the rule of construction is in favor of, and not adverse to, the extension to the franchise. Even in the case of *Leigh v. Hinde*, (1) the judges were not unanimous. Mr. Justice Parke, whose authority is entitled to great weight, said, that he thought "the proper mode of measuring the distance would be, to take a straight line, from house to house, in common parlance, as the crow flies." And that the rule laid down in that case does not apply to the present, is shown by the judgment of Mr. Justice Little-dale, who held, that if a shorter way of access to the house of the defendant should be opened to the public, by the formation of a new street, he would be guilty of a breach of his agreement, if he carried on business within half a mile, measured by the new road, a principle of construction that certainly cannot be applied to the determination of this case. To measure this distance by any other than a straight line, will make the right of voting depend upon accidental and contingent circumstances, and will materially interfere with and limit its exercise.

It was unanimously *resolved*.—That the name of John Boles Johnson, be retained upon the poll; and that the

(1) 9 B. & C. 774.

distance ought to be measured by a mathematical (straight) line. (1)

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RICHARD WALSH'S CASE.

The voter was objected to on the part of the petitioners, upon account of the non-payment of a municipal tax.

Mr. *Andrews* required that the rate-books should be proved.

Mr. *Allen*, the Mayor of Youghal in 1819, was called.

(1) The Municipal Reform Act, 5 & 6 W. 4, c. 76, s. 9, provides "that in every case provided in this act, the distance of seven miles shall be computed by the nearest public road, or way by land or water." This enactment has been considered to be illustrative of the intention of the legislature in the measurement of distances under the Reform Act. It ought, however, to be observed, that the Boundary Acts 2 & 3 W. 4, c. 64, 65, and 89, mark out the electoral district of numerous boroughs by straight lines. If the house of a voter, claiming under the household franchise, lies between two points, between which a straight line must be drawn in order to ascertain it is within the borough, there appears to be no reason that can be treated as repugnant to the intention of the Reform Act, why a straight line should not be drawn from the polling place to the house of a voter claiming the franchise as a freeman, in order to ascertain if he is within seven miles drawn in a straight line from a polling place. By the 23 Eliz. c. 5, it was enacted, under the notion that timber for building, as well as wood for fuel, "doth daily decay and become scant and will in time to come become much more scarce, by reason whereof the prices are grown very great and unreasonable," that no person should convert or employ to coal or other fuel for making iron, or iron metal, in any iron mills, furnace, or hammer, any manner of underwood growing within four miles of the town of Rye and other places. In *Wing v. Earl*, 1 Croke, 267, an obligation had been entered into, not to cut wood within four miles of the town of Rye, and Fenner, J., held that if "the question had been upon the statute, the miles should be construed according to the usual way for carriages; but upon the condition if it be four miles any way, the condition is broken." In *King v. Mead*, 1 Ventris, 328, after a verdict against the defendant on an information under the 17 Ch. 2, c. 2, which restrained non-conforming ministers from inhabiting within five miles of a borough town, it was moved to arrest judgment, the information alleging, that the town in which the defendant dwelt was within five miles of a borough town, but not that the place of his habitation in that town was so, and therefore, that it might be intended to be more remote. But judgment was given for the crown. See 2 Blackst. 968.

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His son was Mayor in 1830, in which year a meeting of the inhabitants of the borough was held, to memorialise the Lord Lieutenant to extend the provisions of the 9th Geo. IV. c. 82, to the borough of Youghal. The memorial was signed by Mr. Allen, junior, and was presented to the Lord Lieutenant, who complied with its prayer, and commissioners were appointed to carry the Act into effect. A book, entitled "Proceedings of the Commissioners appointed under the 9th Geo. IV. c. 82, for Lighting and Cleansing the Town of Youghal," was proved, together with a valuation of property, made under the 35th section of that Act, and the rates and warrants authorizing the collection of a rate in the years 1834, 1835, 1836, and 1837.

What a sufficient tender of payment of rates.

The voter, Richard Walsh, was in arrear at the time of the election, of the rate for the year commencing the 1st of August, 1836. It was collectable under a warrant dated August 22, 1836. A demand for payment was made upon the voter several times, and upon its being made shortly before the election, he replied, "that he did not intend to vote at all." The collector left Youghal at three o'clock on the day before the close of the poll, giving directions to his daughter to receive any arrears that might be offered to be paid. Walsh voted upon the last day, but before he voted he gave an order to one Brown for the amount of his arrears, who took it to the house of the collector. The daughter of the collector was offered the order, who refused to take it. Brown then said, "as you will take no order I suppose you will take money," and put his hand to his pocket, as if to take out money. She replied, "that she would take neither order nor money." Brown did not show her any money; he was not authorized to pay any money, and he could not say if he had as much money, at the time, as would have

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covered the amount of what was due, but he should have paid her, if she would have taken money. (1) The order was an order to a Mr. Penrose, to call on a Mr. Lamb, for the money, and it was left by Brown on the table, in the parlour of the house of the collector. After the election, Lamb told the collector that he would not have paid the money if the order had been presented to him. No demand for the arrears had been made since the election, and they still continued due. Walsh, however, after being informed by Brown of his interview with the daughter of the collector, went to the polling place and voted.

Mr. Andrews.—The tender of the arrears by Brown was sufficient to enable the voter to poll and the objection to his vote cannot be supported. The collector, before he left Youghal, ought to have left some person competent to fill his place, especially as an election was going on, and the tender of arrears of the rate was certain to be made by many voters previous to their presenting themselves to vote. His daughter ought to have taken the money and she acted improperly in refusing it. The tender made to her was sufficient. It is true that in order to prove a legal tender it must be shewn that there has been an actual offer of it. But this is not necessary, when the production of the money has been dispensed with either by an express declaration or an act equivalent to it. *Thomas v. Evans*, (2) *Dickenson v. Shee*, (3) *Starkie on Evidence*, (4) *Harding v. Davies*, (5) *Finch v. Brooke* (6).

Mr. Walpole.—The authority given to Brown was to

(1) There is some ambiguity in this statement, but it contained in the evidence. The witness was asked, "Had you the money at the time?"—A. "I cannot say I had so much as would have covered the amount at the time, but if she had said she would take the money, I certainly should have paid it." No further question was asked to explain what was meant.

(2) 10 East, 101.

(3) 4 Esp. C. 68.

(4) 2 Starkie on Ev. 778.

(5) 2 C. & P. 77.

(6) 1 Bingham, N. C. 253.

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present an order, which the person to whom it was addressed has refused to pay. It was not a draft for money, but a note, in the form of an order. The order, therefore, could be no tender of payment. But Brown, it is said, offered to pay the money. What was his conduct? "I suppose," said he, "that you will take money?" This remark was a mere inquiry, and not an offer to pay. If he intended to have paid money, would he not have left it upon the table instead of the order, or with the order; and did not his leaving the order show that he only desired to execute the commission with which he was charged, and not himself to pay the arrears? He is unable to say, if he had sufficient money at the time he made the offer to pay to discharge the debt—if he is to be considered to have made such an offer. Unless he could say, that he possessed the means to pay, if the alleged tender, had been accepted, he cannot be said to have made any offer or tender of the money.

Vote held good.

KYRLE LIDLEY'S CASE.

In a case of scrutiny, the particular objections intended to be insisted on, need not be set forth in the petition.

This voter was objected in the lists delivered upon the part of the petitioners, on the ground, that he was admitted a freeman of the borough of Youghal, and who, if he was a freeman, did not, at the time of polling, reside within seven statute miles of the usual place of election, within the said borough as described by the act 2 & 3 W. 4, c. 88. The petition contained no allegation against non-resident freemen, and the statement set forth, that the petitioners meant to insist upon and contend for the objections to the several voters, admitted to poll at the said election, contained and specified on the lists of voters objected to by the petitioners and delivered therewith.

Mr. *Austin* objected to the consideration of this case.

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Neither the petition nor the statement delivered in by the petitioners state any objection to non-resident freemen. By the 42 G. 3, c. 106, s. 3, and the 47 G. 3, c. 14, s. 14, the inquiries of the Committee are limited to the matters and things contained in the petition or statement, and it is directed, that "no witness or witnesses shall be called or examined by or on the behalf of the said parties before the said select Committee, or before the said Commissioners, or either of them, to any matter or thing, not specified and contained in the said lists or statements respectively or in the petition complaining of the election or the return in question." The parties, if they please, may make the charges of their petition large and their statement equally so, or they may narrow down the charges of their petition in their statement. But the petition and the statement are, in this case both defective. The petition ought to contain every thing that it is intended to insist upon. Throughout the acts constituting Committees for the purpose of determining the merits of election petitions, they are stated to be appointed for "the trial of the said petition." It is the matter of the petition that is referred to trial. If it were otherwise, a party prepared to meet various charges of bribery to which a petition might be confined, might upon the interchange of lists, find himself suddenly called upon to support various rights of voting which he had no expectation and no notice of any intention to attack. Here the petition not only contains no allegation against non-resident freemen, but the statement also omits it. The object of the provisions of the act was to compel parties to specify and to particularize their objections more distinctly, than had formerly been the practice when a petition alone was presented. It was to enable the sitting member to limit his inquiries in the preparation of his defence and to know

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the questions he might be called upon to argue. It was not to enable the petitioner to suppress a part of his case in his petition and after the sitting member has completed the preparation of his defence, to put into the lists allegations upon which the petition is silent.

Mr. Pollock.—It is the fact that no part of the petition relates to the case of this voter, but if it is sufficient that the matters or things intended to be brought under the consideration of the Committee should be expressed in the statement. The reference in the statement of the petitioners to their list of objections, both of which are delivered at the same time, meets the objection that has been made. The statute does not require that the matters or things intended to be insisted upon shall be contained in the petition and statement, but simply that they shall be inserted either in the petition *or* in the statement.

The Committee stopped *Mr. Pollock* and informed him that they were satisfied that they might proceed with the case. (1)

JAMES BROWN'S CASE.

Where a voter had laid a wager on the result of the election, but it did not appear that it had been done with a corrupt motive, his vote was allowed.

This voter was objected to, by the petitioners, upon the ground of his having made a wager upon the result of the election. He made a bet of a sovereign with one Gardiner, not an elector, that *Mr. Howard* would be returned. Gardiner was the son of a solicitor, who voted for *Mr. Nicol*, and who took an active part with the conservative party, at the registration in July, 1837. A shilling was deposited in the hands of a *Mr. Purdon*, by Brown and Gardiner, as earnest of the wager. Purdon knew that Brown intended not to vote for Nicol, and he told him after

(1) Certain members of the Committee were of opinion, that the disjunctive words of 47 G. 3, c. 14, s. 14, authorized them to take into consideration allegations in the statement or lists, which were not referred to in the petition.

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the bet was made, that it would vitiate his vote, but Brown made no request that the shilling he had put down should be returned to him. Purdon informed Gardiner, the elder, of the bet, within three hours after it was made, and one witness stated, speaking of it, that Purdon had said, "they had laid a trap," or words to that effect. Purdon, however, denied having used such expressions. No other money than the shilling had been paid.

Mr. *Austin*.--The first answer to this case, is, that there was fraud in the transaction, and, secondly, if there was no fraud, there is still no ground for the objection. Upon the question of fraud, the Committee is as competent to draw conclusions from the evidence as counsel. The petitioners need not have relied upon the evidence of Purdon. Where was Gardiner? Why was he not forthcoming? We offer the voter for examination, we waive all objection to his examination, but the petitioners object to his evidence. It is clear, from the facts, that a trap was laid. But in point of law there is no objection to the vote. It may be admitted that if a wager is made as a bribe it vitiates the vote, because the vote is given under a corrupt influence, and a bribe is often given under the pretence of a wager. But if it can be shown that the transaction is not corrupt, the vote cannot be affected. The remarks of Mr. *Rogers*, *Law of Elections*, upon this matter are very correct. "This case (*Allen v. Hearne*) only decides, that a bet upon the issue of an election, between two voters is not such a contract as ought to be supported in a court of justice, but it does not as a judicial authority, decide every wager upon an election, between voters to be necessarily a *bribe*. The language imputed to Mr. J. Buller, assumes that every wager between voters is a sum of money laid to procure a particular vote; and, no doubt if every wager on an election were made with that object,

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every wager would be a bribe; but if the situation of the parties, their known political principles, the amount or nature of the bet or other circumstances, forbid the conclusion that the bet was either offered or accepted with a corrupt intention, although a court of justice may refuse to enforce it, on the ground that such a bet was against public policy, a Committee would hardly consider it as a bribe, if the very essence of bribery, that is to say, corrupt influence, were negatived by the circumstances of the case." (1)

Here it is not shown that that the voter was influenced by the wager. He was expected to vote upon the liberal side when he made the bet, and the object of the bet was to disqualify him. There is nothing corrupt in the transaction as it affects the voter. Even the money betted has not passed. No payment of it has been made. The shilling that was deposited, is the only money that has changed hands.

Mr. Pollock.—In the case of *Allen v. Hearne*, (2) *Mr. Justice Buller*, distinctly states that the law requires the voter to be free, till the last moment of giving or withholding his vote, which he cannot be if he has laid a wager. *Mr. Justice Ashurst* in the same case says, "the bias occasioned by a wager, cannot be got rid of." *New Windsor case* (3); *Worcester case* (4). The principle is, that the voter shall not place himself under such an obligation as shall prevent him, even at the last moment, from forming an unprejudiced judgment of the merits of the candidates, between whom he is called upon to decide. In the *Monmouth case* (5) it was certainly decided, that as the vote was not affected by the wager, it should remain on the poll. *Mr. Rogers* calls this a subsequent decision to those in the *Worcester* and *New Windsor* cases, yet as

(1) *Rogers on Elect. Law*. 236.

(4) *K. & O.* 255.

(2) 1 *T. R.* 60.

(5) *K. & O.* 416.

(3) *K. & O.* 191.

it was made before they were published, it deserves no remarkable weight on this account. The former cases strictly adhered to the rule that as a wager must impress the mind of the voter with an undue bias, his vote shall not be allowed. With respect to the facts of the case, what evidence is there of fraud? When the bet was made the voter was informed that it would invalidate his vote. Did he ask to revoke the bet? There is no evidence to show that he did not voluntarily enter into the agreement, willing to incur every hazard, and continue to consider himself bound by it. There was no concealment practised. Purdon related the facts within a short time after the wager was made—in his examination he stated a plain tale, and nothing has been said to shake his statement.

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It was resolved that the vote should be allowed.

In this case Mr. *Austin* proposed to call the voter.

Mr. *Pollock* objected. If the vote was disposed of, and it was sought to examine the voter upon a charge of bribery, against Mr. Howard, he might be called to explain the transaction, so far as he might be affected by it. *Rogers on the Law and Practice of Election Committees*, (1) “As a voter cannot be called to substantiate his own vote, it would seem to follow that he cannot be called upon to disprove being bribed. *Dumfermling*, 1 Peck. 6, but see *Worcester case*, 3 Dougl. 272. But where the object is not to substantiate his own vote, he is competent.” The vote is here contested, and it is not for the purpose of disproving a matter incidental to the voting of the party, but to sustain the vote itself, that it is proposed to call the voter. On the authority of previous cases, this evidence is not admissible.

Evidence of a voter whose vote was objected to on the ground of having made a bet, rejected.

Mr. *Austin*.—A voter cannot be called to support his qualification by swearing to its value, or to the sufficiency

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of his residence, or with respect to matters of a similar nature, but in the *Ilchester case*, (1) the voter was permitted to be called, not to disprove an act of bribery, but to explain it. In the *Dumfermling case* the voter was called to contradict and to disprove the act of bribery. It is not, however, here proposed to examine the voter, in order to deny the fact of his having made the wager, but to explain the circumstances under which it was made. The effect of the act that he engaged in, is a matter of argument, and it is not for the purpose of denial, but of explanation, that it is proposed to examine him.

It was resolved—That the evidence of James Brown, the voter, is inadmissable.

EDWARD BOWLER'S CASE.

The Committee decided in favour of opening the register.

Mr. *Andrews* argued in this case, that the register ought not to be opened.

Mr. *Thesiger* contended in favor of the opening of the register.

It was resolved—That the register be opened generally. (2)

RICHARD SMITH'S CASE.

A Committee will entertain the objection, that a voter has offered a bribe—but this decision afterwards reversed.

The voter was objected to in Class 9, of the list of the sittings, on the ground that he had bribed a voter.

Mr. *Pollock* objected to this class of cases being entered upon. A voter is not disqualified because he merely

(1) 3 Doug. 165.

(2) It has not been considered necessary to print the arguments in this case. The arguments on the same question in two cases being contained in this volume.

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offers a bribe. *Coventry case*. (1) Mr. Serjeant Peckwell remarking on that case, says that though such an offer is doubtless a great misdemeanor, it has never yet been held to infer a disability to vote. *Bridgewater case*, (2) it was resolved, that voters offering bribes to other voters, by that act, were not disqualified from voting. This was undoubtedly considered to be the law, at the time of the passing of the 4 G. 4, c. 55, s. 81. (3) Any person who shall be guilty of bribery under that section is not disabled to vote, and his vote is not invalid, until "after judgment obtained against him in any action or information grounded on this act." If the disqualification is only to follow the judgment, the right of voting is not affected until judgment is obtained.

Mr. *Andrews*.—Persons who offer bribes are equally guilty with those who accept them, and the same disqualifications affect both. *Rex v. Vaughan*. (4) "Wherever," said Lord Mansfield, "it is a crime to take, it is a crime to give, they are reciprocal. And in many cases, especially in bribery at elections to parliaments, the attempt is a crime; it is complete in him who offers it." At common law, the briber is equally criminal with the bribed, and consequently the disqualification at common law, which renders the vote of the party bribed invalid, extends to the party offering the bribe. The 35 G. 3, c. 29, s. 23, for ever disables the party giving a bribe to vote at any election of a member to serve in Parliament. This is a permanent disqualification. It extended the previous penalties attached to the act of offering to bribe, leaving the consequence of such an act, before judgment obtained in any action, or information grounded on that statute, as it remained at common law. It did not lessen

(1) 1 Peck. 97.

(2) 1 Peck. 102.

(3) This section re-enacts the 23d section of the 35 G. 3, c. 29 (Ireland.)

(4) Burrows. 2494, 2500.

1838. the extent of the penalty existing when it passed, but added to it. If after judgment the briber is for ever disqualified, surely his vote cannot be considered to be valid, if given at the election when the corrupt act was committed.

The remarks of Mr. Peckwell in the *Coventry case* only suggest a probable reason for the decision of the Committee. He could not know, if the reason he assigns guided the resolution that was made. In the reports of Lord Glenbervie, (1) the reporter puts this case; "if an elector is proved to have acted as an agent in bribing other electors, but there is no proof that he himself is bribed, is his vote a good vote or void? Those who argue that it is void say, that the acting as an agent in bribing others is such an infringement of the freedom of election, that the law will presume that such an agent was as little scrupulous with regard to himself, as he had been with regard to others." The very same principle which affects the vote of the party bribed, affects the briber. In the *Ipswich case*, it was resolved, "that Arthur Bott Cooke's vote be struck off the poll, on the ground of having been guilty of bribing other voters." The question was in that case distinctly decided.

Mr. Pollock in reply.—The only decision against retaining the vote on the poll is in the *Ipswich case*, but it was decided under very peculiar circumstances. Cooke had absconded, and there might have been evidence of his having been bribed himself, if he had not avoided the examination to which he was liable. The Committee were precluded, by his conduct, from entering into part of the case, and therefore had reason to presume that bribery might be proved against him.

It was resolved—That the Committee will enter into the ninth class of objections. (2)

(1) 2 Doug. 417.

(2) *Kingston-upon-Hull case*, *infra*, in which case the votes of several persons who had given bribes, were struck off the poll.

The evidence against Smith was then given, and after the Committee were addressed upon the *facts* of the case ; it was resolved, that the vote should be retained on the poll. (March 16.) 1838.

On March 12, 1838, the vote of Joseph Hamilton was struck off the poll, on the ground of the voter being bribed, Mr. *Pollock* admitting that he could not defend it. Mr. *Andrews* then proposed to take the case of the party by whom Hamilton had been bribed, when the Committee, without clearing the room, or hearing any re-argument of the question, informed him that they had resolved "upon re-consideration of all the circumstances of the case, which had been submitted to their decision, that Class 9 ought not to be further proceeded with." (1)

(1) Lord Glenbervie puts (2 Dougl. 417) this case ; "if an elector receive a bribe in order both to vote himself and to procure the votes of others, and he, from that corrupt motive do procure the votes of others, but without corrupting them, and merely by persuasion, or a justifiable influence which he may have over them, shall the votes so procured be considered as good, or as being void ? I am not aware that this question has ever been agitated before a Committee of elections ; but it was the chief point in the case of the annual election of the magistrates of the borough of Stirling, in Scotland, for Michaelmas, 1773, and the Court of Session avoided the election on the ground that such votes were bad. As they must have determined this on general principles, those principles would be equally applicable to votes at an election of a member of Parliament. But the decision was carried by only a small majority ; I believe only of one voice, and an appeal was brought in the House of Lords."

The case referred to, *Alexander v. Paterson*, was decided in the House of Lords, November 8th, 1775, when the appeal was dismissed and the interlocutory complaints of were affirmed. The Court of Session had determined, that certain bonds that had been given, were illegal, unwarrantable, *et contra bonos mores*, and that the same had an undue influence on the election of the magistrates. The election was, therefore, declared null and void, and the complainants were given their full costs. The court, also, by a second interlocutor, determined to hear counsel how far the bondsmen were liable to censure for having entered into so corrupt and flagitious association as that which influenced the election. See *Rogers on the Law of Elections*, 92, 5th Edition, who cites the case of the borough of Stirling, but omits to notice the fact of both the interlocutory of the Court of Session being confirmed by the House of Lords. See *Cases of Appeal in the House of Lords*, and *MS. Entries of Judgments*, in *Lincoln's Inn Library*.

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ROBERT DAVIS'S CASE.

A witness may be examined, although he has subscribed to the expences of the petition.

In this case, it was proposed to examine R. G. Davis, who had subscribed to the expences of the petition.

Mr. *Andrews* objected to the examination of this witness. By subscribing to the expences of the petition he had rendered himself liable to the same objection as may be made to the party on the record.

Mr. *Pollock*.—If the witness was a surety to the petition, the objection to his testimony might be valid, but he has subscribed a gross sum of money, he is not liable to the costs of the petition, nor is he interested in the result of the petition. *Southampton case*, (1) *Coventry case*. (2) In these cases a similar objection to the present was overruled.

It was resolved—That Roger Green Davis might be examined. (3)

JOHN POLLOCK'S CASE.

It is not necessary that proceedings at law should be taken against a free-man, in order to be entitled to question, before a Committee, his right to vote.

This vote was objected to under the 9th section of the 2d & 3d Wm. IV. c. 88, on the ground that the voter had no title to vote by reason of birth, marriage, or service.

Mr. *Pollock* took a preliminary objection to the consideration of this class of cases. Whenever a person is admitted to a corporate office or to the freedom of a corporation, it is competent to question his right, by an application to the Court of Queen's Bench, in the nature of a *quo warranto*. This is the legitimate mode by which parties improperly exercising corporate offices, or being freemen of a corporation, are to be removed, and their titles abrogated. It has, therefore, been always the subject of argument, whether Committees should enter upon

(1) P. & K. 220.

(2) P. & K. 220, n.

(3) *Walsall case*, ante p. 361.

the consideration of the title of a freeman who has been in possession of his freedom for a considerable time, unless it can be shown that proceedings have been taken in the Court of Queen's Bench, in order to remove him from his freedom. The decision of the Court upon such a question would be conclusive, if any imperfection in the title of the persons included in this class of objections, to their freedom existed, or was known or supposed to exist. If the Committee was to come to the conclusion, that the vote of Mr. Pollock ought to be struck off the poll, that would not deprive him of his freedom; he would still be upon the rolls of the corporation as a freeman. The only effect of the decision would be to affect the vote. The course of proceedings in this case is thus stated by Mr. *Hudson*: (1) "A new rule has been established, of late years, in conformity with certain decisions at common law, with respect to freemen who, having been improperly admitted, have been suffered to remain members of the corporation, the legal means for ousting them not having been adopted. Formerly it was allowed to the opponents by whom their votes were disputed, either to prove a corrupt admission, or due diligence to oust them of the franchise, and in either of those alternatives, the votes were rejected. But it now seems to be established, that due diligence must be used by an application to the Court of Queen's Bench, if there has been time to enforce the ouster, and that a Committee will not try incidentally a question of right, for the decision of which there exists a Court of competent jurisdiction." Now, the decision that the Committee is asked to make, is not a direct decision, which, as a matter of law, if decided in favour of the voter, would give him a title to vote; or if decided against him, would prevent his voting at a future election. His

(1) *Law of Elections.*

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name cannot be removed from the register, nor will his title to vote be abrogated by any decision at which the Committee may arrive. Not so with respect to the decision the Court of Queen's Bench may make. A decision of that Court would determine the title, or confirm the right to vote. Will, then, the Committee enter incidentally into the question of title, when the fullest opportunity has been given to bring it before a Court of Law, and thereby to place it beyond a doubt, whether in law or in fact, Mr. Pollock is or is not a freeman of the borough of Youghal. In the *East Retford case*, (1) the Committee refused to receive evidence to question the title of the vote of one Samuel Buxton, who had been admitted into the corporation by redemption, in 1796, the election having taken place in July, 1802, there having been time, between the period of admission and of his voting, to have determined his title in a court of law. This decision was made, though an information had actually been filed, but judgment had not been given. The case of *Fowey* (2) appears to take a different view of this point, but is clearly distinguishable from this case. The Prince's tenants were sought to be struck off the poll, and it was objected that proper legal proceedings had not been taken to remove them. The competency of the objection was admitted, but it was answered:—1. That no direct proceedings could be instituted for that purpose. 2. That their titles had been impeached by the only possible method, namely, by impeaching the title of the portreeve who had elected them. This case occurred in 1791, and that of *East Retford* in 1803, so that there was an interval of twelve years between them. In the *Bedford case* (3) this same point arose, but it does not appear whether a decision was made upon it, but between the time of the *Bedford case*, in 1775, and the

(1) 1 Peck. 477.

(2) 1 Peck. 483.

(3) 2 Dougl. 80.

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East Retford case, in 1803, the case *King v. Symmers*, (1) came under the consideration of the Court of King's Bench. Upon these cases Mr. Serjeant Peckwell remarks. The result of them appears to be :—1. That this necessity of legal proceedings is not to be met with until the year 1775, when it was first insisted on in the case of *Bedford*; nor, perhaps, is the recentcy of the doctrine to be wondered at, when it is considered that it was not until the year 1776, that any rule upon the subject was laid down in the courts of common law; *Symmers v. Regem*. It further appears, that the principle was disregarded in several subsequent cases, and that, in fact, it was never effectively applied by any Committee whose proceedings are reported, to a question of corporate rights, until the case of *Harwich*, 1803. (2) In *Deane's case*, the Harwich Committee intimated it to be their opinion, that as the objection to Deane, a burgess, had been suffered to remain so long (from 1798 to 1802), without any notice taken of it, or any effectual steps taken to remove him, they would not enter into the case. In the *Weymouth case*, (3) a similar decision was made. The question appears to have been incidentally referred to in the *Coleraine case*, (4) but it was not decided. Under the circumstances, then, in which this vote stands, the Committee, following the current of authorities, will refuse to enter into the consideration of it, since the question raised is one of title, which this is not the proper tribunal to try.

Mr. *Harrison*.—There is no doubt, that from the cases in Peckwell, the inference may be drawn, that it was formerly supposed, that unless there had been what was called due diligence, that is, unless the parties, having the power to go before the Court of King's Bench, had gone

(1) Cow. 493. 1 Peck. 487.

(3) 2 Peck. 229.

(2) 1 Peck. 393.

(4) P. & K. 503.

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there, a Committee would not investigate a corporate right. But all the cases alluded to have been overruled for many years. In the *Banbury case*, Mr. Francis Horner, of whom the highest expectations were formed, and the early termination of whose public career, was the misfortune and regret of all, considered the objection to be so important, upon account of the decisions in *Peckwell's Reports*, that he directed it to be fully argued. Mr. Wilson, K.C., Mr. Dampier, Mr. Serjeant Lens, and Mr. Pell, were heard upon it, and the Committee resolved, that they were bound, in duty, to enter into the consideration of every question connected with the right of voting, without reference to the fact of due diligence having been used or not. This decision was not disputed until the *Limerick case* (1) in 1821, and about the same time, in the *Portsmouth* (2) and in the *Stirling cases*, (3) but in all of them without effect. In the *Wexford case*, (4) *West Looe*, (5) *Fowey*, (6) *Sudbury*, (7) *Bishop's Castle*, (8) *Portsmouth*, (9) and *Rye*, (10) the decision of the Banbury Committee was upheld. Mr. Hudson, whose work has been cited, himself says, (11) "the modern cases seem to establish that the law does not affect the right to try the question before a Committee." The law is settled, and it is with some astonishment that it should now be heard to be treated as doubtful.

But the argument is, that this being a corporate right, or title, which the Court of Queen's Bench in Ireland can investigate, and that as there has been an opportu-

(1) Minutes, 1821.

(2) Minutes, 1820.

(3) MS. of Mr. Harrison.

(4) Hudson, 427.

(5) 3 B. & C. 683.

(6) C. & D. 155.

(7) Phillip's cases, 189.

(8) Minutes, 1820.

(9) Minutes, 1820.

(10) 85 Journals, 429.

(11) The Minutes referred to in some of the above cases were burnt when the Houses of Parliament were destroyed by fire. Mr. Harrison referred to his MS. in citing them.

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nity to investigate it, the Committee ought not to try it, the Queen's Bench being the proper forum to which it should be referred. The proper forum for what? For trying if the persons in this class are freemen of the borough of Youghal. What has the Queen's Bench to do with the register or with their right to vote? They may be perfectly good freemen of the borough, and yet be without any title to interfere in elections. The Queen's Bench can only decide if they are corporators. What is attacked is the title to vote, not the title to be a member of the corporation. The latter question may incidentally arise here, as the former may incidentally arise before the Court of Queen's Bench; but as the right to be a member of a corporation is directly within the jurisdiction of the Court of Queen's Bench, so is the right of voting directly within the jurisdiction of this Committee? These persons may be freemen, but it is alleged that they are not entitled to vote. The question of a title to the freedom may not decide a right to vote, if the title to the freedom was established.

Besides the candidate could not call in question a corporate right, if he himself is not a corporator. This is the only tribunal to which he can refer in order to have it decided, if a majority of legal votes were given in his favor. A corporator only can sue in corporate matters; a corporator only can have access to corporation books. This alone affords the strongest reason why the Committee should assert its jurisdiction.

Mr. *Pollock* in reply, It is said that these persons may be legal corporators, but why then is their right to vote disputed, or how can it be disputed but by calling in question the title to their freedom?

Committee.—Is it said that the corporation could admit persons to their freedom for all other purposes, except that of voting?

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Mr. Harrison.—No, it is quite immaterial if the corporation has a right to make freemen, the question is, if the persons alleged to be freemen have a right to vote.

Mr. Pollock.—The voter Mr. Pollock, claims to be a freeman by birth, and was admitted as the eldest son of his father. If his title to vote is impeached, it is because his title to be a freeman is also impeached. The one proposition is involved in the other. He has a title to vote, if he is not, he is a mere honorary freeman. The impeachment of the title to vote, involves the title to the freedom and nothing else, for the objection at the head of the list is that he had no title to the freedom, by birth, service or marriage. Committees have gone into these questions, but it is imprudent and inconvenient to do so. The decision may be erroneous, as it must involve a question of corporation law, which this tribunal cannot satisfactorily decide, and all that is asked is, that the rights of these freemen may not be injured, and that they may be left to a court of competent jurisdiction to deal with. There are cases on both sides, and in the opposition of authorities, it is best that questions of law should be referred to judges who are accustomed to investigate them.

It was resolved to proceed with the case of John Pollock, Junr.

Right of freemen of the borough of Youghal to vote at elections.

George Hatchell produced from the Rolls Office, Dublin, the charter of the town of Youghal, dated 1609, and Mr. Giles, the Mayor of Youghal, produced a sealed parcel, which he opened before the Committee, containing various charters of the borough. These charters he had sent for, and received since his arrival in London.

The charter of James I. recited charters of the reign of Edward IV., Richard III., Henry VII., and Queen Elizabeth, by which certain privileges were granted to the "mayor, bailiff, burgesses, and commonalty of

Youghal," and authorized the meetings of the corporation in the hall or tholsel of the town to make bye-laws.

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The town-clerk of Youghal read various entries from the books of the corporation produced by him. An entry, dated September 8th, 1719, reciting a bye-law, then passed, that no person should be free of the corporation, but such only as the members of the Court of D'oyer Hundred, with the consent of the mayor and bailiffs, should think fit to admit.

A bye-law respecting the last bye-law upon account of the power given to the bailiffs, and ordaining that no person should be free of the corporation (all freemen theretofore made excepted) but such as should be admitted and made free by the D'oyer Hundred jury, with the assent of the mayor for the time being, in open court of D'oyer Hundred; or such as the majority of the common council for the time being, legally convened in public council, should, in like manner, admit and make free.

Jan. 17th, 1774.—Whereas several bye-laws are subsisting in this court in regard to the making of freemen, one in particular made the 18th of June, 1756, (to wit)—“ it was this day agreed and resolved on, in open court, that all such persons and inhabitants of this town, who are, or shall be married to the eldest daughter of any freemen at large inhabiting the said town, as also the eldest son of any freeman at large of the said town, and all that have and shall serve an apprenticeship of seven years to any trade with a freeman at large of the said town, are entitled to his, or their freedom at large, of this corporation, and have an undoubted right thereto, are hereby repealed and made void.”

October 31, 1834. “Freemen at large. Ordered, that Major John Andrews, of Youghal, &c., (other persons

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also named.) John Pollock sen., and *John Pollock*, jun. attorneys at law, all of Youghal, be and they are hereby admitted free at large of this corporation.

1835. "Ordered on the several petitions of Richard Tarbuck, water-bailiff, who is married to Jane, the eldest daughter of Edward Morgan, a freeman, deceased; (others also named.) John Pollock, sen. who is married to Elizabeth, the eldest daughter of Roger Wayler, who was a ~~freeman, deceased~~, that they the said petitioners, Richard Tarbuck, &c. John Pollock, are severally entitled by marriage to their respective freedoms at large," and they were ordered to be admitted.

Sept. 28, 1835. John Pollock, the younger, "*now* the eldest son of John Pollock, the elder, attorney at law, a freeman," was admitted a freeman, "entitled by birthright" to his freedom.

The record of the case of *Rex v. The Corporation of Youghal*, was put in, in which judgment had been given in the Court of Queen's Bench, Dublin, in the year 1768. The jury, among other things, had found, that "there is not, nor hath ever been from time immemorial, a custom within the town of Youghal, that every person who is the eldest son of a freeman at large of the said town, and a resident within the said town, or liberties, and who shall claim the privilege or freedom thereof, should be admitted to the place or privilege of one of the freemen at large thereof, and should have, and use, and enjoy all the privileges, pre-eminences, and profits to the freemen of the said town, belonging or appertaining;" and they made a similar finding respecting a claim to the freedom by reason of apprenticeship.

The town-clerk stated that according to the usages of the corporation, the admissions on October 31, 1834, were honorary, being by curtesy, or by special grace or favor. The admissions on September 28, 1835, were the first that

had been made in respect of birth during the whole time, (twenty-five years,) that the town-clerk had been in office. John Pollock, the voter, described in the last entry, as *now* the eldest son of John Pollock, the elder, was his second son, his elder brother, Hugh Pollock, having died before the admission of his father, leaving a son living at the time of this inquiry.

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In support of the vote various entries of admissions to the freedom of the borough of Youghal, on account of birth, service, and marriage, were read from the books of the corporation:—

Jan. 19, 1683. John Croker, merchant, who served seven years an apprenticeship with Richard Burt, a freeman at large of the corporation, was admitted to his freedom, he giving a bond to the Mayor, with a condition, that if he should live away from the borough, he would pay all dues on goods that he should import or export, at Youghal, as if he were no freeman.

Sept. 29, 1683. William Hind son of James Hind, a freeman, and Thomas Brown, who had served an apprenticeship seven years with a freeman, were admitted as freemen, giving to the corporation, a musket, sword, and bandileer.

Jan. 1618. Thomas Nugent exhibited his petition to the court for his freedom, by reason that he had married a freeman's daughter, and was admitted on paying a fine.

Various other entries, dated Jan. 10, 1758, May 10, 1773, June 29, 1759, were also read.

Mr. Pollock.—Unless the Committee shall be of opinion that Mr. John Pollock, the younger, was an honorary freeman, admitted without any inchoate right whatever, without any claim upon the corporation, by usage or otherwise, to be admitted, they will be bound to refuse to strike his name off the poll.

Committee.—There are two questions, the general one

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Mr. Pollock.—It is the eldest son of a freeman, who at the time when the father is free is the eldest son, who is entitled to the freedom by birth. Therefore, if a man has five sons and before he is admitted to the freedom, shall lose the four eldest, the fifth will be entitled to be made free, by reason of his being the eldest son of the freeman. If the father never takes upon the freedom, none of his sons will be entitled to it, it being a freeman *de facto*, who transmits the privilege. This answer disposes of the question suggested as resulting from the particular facts of this case.

Upon the general question, it may be stated, that there are three sorts of freemen admitted by the corporations in Ireland—there are some corporations which have no *veto* upon claims to the freedom, by reason of birth, service or marriage; there are others, among which are Dublin and Youghal, in which the parties may have a right or a claim, but to which the corporation may refuse to give effect, and there is a third class who are purely honorary. The case most illustrative of the title of the second class to vote at elections is that of Masters of Arts of the University of Dublin. A person who has kept his terms, who has conformed to the rules of the University, and who is of a certain standing is entitled to claim his degree of Master of Arts, but he cannot enforce this claim, if the University authorities oppose it. Will it be said, however, that because the claim may be refused, because it may be defeated, that when this person is admitted he may not vote at elections for a representative of the University? The defeasibility of the claim does affect the title to it. A freedom may exist in right, and be recognized by the grace of the corporation; but as the right exists independent of the grace of the corporation, by which it may be acknow-

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ledged, the freedom that is obtained through it, is not honorary, and, therefore, not within the exceptive proviso of the 9th section of the Irish Reform Act. Is then Mr. Pollock an honorary freeman? The record that has been put in may be disposed of at once. The charter that has been read, and the charter under which the corporation acts is of the reign of James I. The case to which the record relates is founded, not upon the charter, but upon a prescriptive title; that is the claim upon the face of the record; that is the claim denied on the record. The Court determined that there was no immemorial usage and no prescriptive right. How could there be? The prescription must have existed previous to the year 1189, and the corporation act under a charter of the 17th century. But the Committee are ignorant of the facts of that case; they cannot know if there was a failure of evidence on one side, or the nature of the defence on the other. Certain it is, that the books of the corporation shew that at the time that it was pending there were very great disputes among the members of the corporation and that many persons who had been refused their freedom—including among them Child, to whom the suit personally related—were actually admitted in 1773. This being the fact, this record cannot be treated as determining the question before the Committee.

From the entries that have been read, it is clear that long before the year 1610, burgesses were admitted by the corporation of Youghal, in right of birth and of service, and the entries subsequent to that date confirm this to have been the custom. The persons demanding their freedom were certainly placed under conditions, but they were such as the corporation had a right to impose; in some instances, contributions to the funds of the borough, and in others, contributions of stores and of arms, for the defence of the town. But the right to the freedom is

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recited, on the admissions, to be in virtue of a particular title; the payment of a fine, or the contribution of arms, not constituting any part of the title, or being recited as the reason for allowing the party to take up his freedom. The evidence, indeed, that has been read, proves that this right by birth, service, and marriage, has existed for upwards of two centuries, and it is from the entries read from the books that have been produced, that this right must be established. A similar right to this exists in the corporation of the city of Dublin. *In re Carolin* and *in re Hyde*, (1) it was held, by Chief Baron Joy, to entitle certain claimants to be registered as voters. The marginal note to the case is, "every person claiming to be admitted a freeman of the corporation of the city of Dublin, by reason of birth, marriage, or servitude, must present a petition or beseech to the corporation, stating the right in which he claims to be admitted, and must be approved of by the corporation before he can be admitted. The corporation exercises the right of rejecting such persons, without assigning any reason for so doing, and without having any doubt of the truth of the facts stated in the beseech. *Held*, that freemen admitted by reason of birth, marriage, or servitude, since March 30, 1831, were not honorary freemen, within the meaning of the 2d & 3d Wm. IV. c. 88, s. 9." "The Reform Act," said the Chief Baron, "gives the right to register to every person who, by reason of birth, marriage, or servitude, shall, at any time after that Act, be admitted to his freedom, and therefore, all that is necessary to establish is, that, as against the corporation, the applicant has been admitted to his freedom in one of these rights."

This is a solemn decision that persons admitted to their freedom, in virtue of the rights reserved by the Reform Act, whose admissions might be refused without appeal,

(1) *Jones's Reports*, (Ex. Ireland), App. 1.

are not honorary freemen, and it is not to be presumed that the Committee will overrule it.

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Mr. *Harrison*.—Freemen can only exist, either by charter or by prescription, and there is no intermediate class between those who have a legal right to be admitted and those who are admitted honorary freemen, by the grace and favor of the corporation. Prescription must be founded on ancient usage, and that usage must be uniform and consistent. But in nearly all the cases that have been cited, the freedom is granted burthened with various conditions which prove it to have been granted by favor.

In this case, Mr. Pollock is not the eldest son, and it is no answer to the objection to him, that there is a grandson who cannot take the freedom on account of his father having died before his grandfather was made free. It is the eldest son only who can be admitted, and no authority has been cited to prove that the eldest son, *de facto* at the time of the admission of the father, is entitled to the freedom, when there is an heir of an elder son in existence.

In the cases of *Carolin* and *Hyde*, the Chief Baron held, that as against the corporation the evidence that had been produced was conclusive, and therefore ought, with reference to the situation in which the parties were placed, to be considered sufficient to entitle the claimants to be registered; that is between the corporation and the claimants, there was sufficient evidence for the revising barrister to act upon. But what has that case to do with this, when the question is, if the claimant was an honorary freeman, or was admitted as an honorary freeman? In the entries that have been read, birth, service, and marriage are recited in the admissions of certain parties to the freedom, but not as the ground of any legal rights. They were merely set forth as the inducements why the parties were selected in preference to other persons. The corporation rejected and admitted whom they pleased. Service,

1838. or marriage, or birth, were meritorious causes of admission, or of applications for admission, but they gave no title to admission, and the position of the parties admitted in no respect differed from that of a stranger, upon whom the corporation might be induced to confer the freedom.

By the Reform Act, the corporation, since 1830, can confer no title to vote upon honorary freemen, or freemen *ex gratia*, and there is a saving in favor of those who possess inchoate or legal rights to be admitted. But what right to be admitted have those persons whose admission depends upon the grace and favor of the corporation; whose applications can be refused without any reason being assigned, and who cannot enforce their alleged title? In numerous admissions made by the corporation, conditions were frequently imposed. What does this prove, but that the corporation had a right to restrict the freedom, and to limit its extent, by such modes as might appear to them to be proper? The case of *Child* decides the point at issue. The Court of King's Bench determined that the right contended for did not exist, and the question was, no doubt, raised in the mode most favorable to the claimant. Under the charter the corporation claims a right to reject. This power of rejection, without assigning any reason, deprives all persons of any legal rights of admission and the reason assigned for their admission, when assigned, are simply of a meritorious nature, and constitute no part of a legal title. Under the charter, therefore, birth, service, or marriage, confer no right to the freedom. In *Child's case* it was sought to establish a legal right to enforce admission in right of birth and service, through a prescriptive title, and it was decided that upon the ground of custom or of prescription, no such right existed in the borough of Youghal. Neither under the charter therefore, nor by prescription, does a legal right to the freedom by birth, service, or marriage,

1838.

exist. If a person is without the right to enforce his admission, he is excluded under the Reform Act from the right to vote. He is merely an honorary freeman in the language of that Act, when he does obtain the freedom. Between him and the corporation he may be entitled to the privileges belonging to him, as a member of the corporation, but under the Reform Act he is not, in right of his freedom, entitled to vote at parliamentary elections.

It was *resolved*.—That it is the opinion of the Committee that persons admitted into the corporation of Youghal by birth, service, or marriage, do not come under the denomination of honorary freemen, and, therefore, have a right to vote.

The vote of John Pollock, junior, was also allowed.

RICHARD COX'S CASE.

This voter was admitted to his freedom in October, 1834, as the eldest son of Richard Cox, a freeman. The father, who had been admitted a freeman, executed, on August 4th, 1828, an instrument in writing, surrendering his franchise to the corporation, and at a court, the resignation was accepted. He had not been re-admitted.

Mr. Andrews.—The voter is the eldest son of a freeman, who voluntarily abandoned all his privileges of a freeman. The son, therefore, who could only claim to be admitted, as in *Pollock's case*, as a son *de facto* of a freeman, had no title as such at the time of his admission in 1834. He had lost all title to the freedom, for at that time his father was not a freeman. The rights of the son were dependant upon the father continuing to be free, if living, at the time of admission.

Mr. Pollock.—The father, by divesting himself of his corporate privileges, could not destroy the rights of the son. The moment the father became free the son acquired

1838. an inchoate right to the freedom, which no act of the father could, or ought to be permitted to, affect. When the surrender was made, there was a corporate or civil death, and it is not to be distinguished, so far as regards the right of the son to his admission, to a natural death. The decease of the father would not have affected the rights of the son; why, then, should the surrender have this effect? Why should a greater effect be given to the disfranchisement of the father, by his own voluntary act, than would be produced by his death? The father could only give up his own rights, and no derivative right could be touched by his act.

It was *resolved*, to strike the vote off the poll.

Application for
a re-hearing
refused.

Previous to this last case being heard, Mr. *Harrison* applied to the Committee to be reheard upon the right of freemen to vote at elections. Mr. *Pollock* opposed the application, and the Committee refused to grant it.

The petition was abandoned by the petitioners, and the sitting member was declared to be duly elected.

The petition and the opposition to it were declared not to be frivolous or vexatious.

CASE XIII.

BEDFORD.

The Committee was chosen on Thursday the 3rd of May, 1838, and consisted of the following Members:—

Lord Ebrington (Chairman) *Devonshire.*

Thomas Charlton Whitmore, Esq. (1)	Charles Crespigny Vivian, Esq.
<i>Bridgnorth.</i>	<i>Bodmin.</i>
Sir Charles Lemon, Bart.	George Richard Phillips, Esq.
<i>Cornwall, West.</i>	<i>Poole.</i>
Arthur Blennerhasset, Esq.	Sir Thomas Hepburn, Bart.
<i>Kerry County.</i>	<i>Haddington County.</i>
John G. Brabazon Ponsonby, Esq.	Hon. John George Fox Strangways,
<i>Derby.</i>	<i>Dorsetshire.</i>
Alexander Spiers, Esq.	John Heathcote, Esq.
<i>Richmond.</i>	<i>Tiverton.</i>

Petitioners—

G. P. Livius and others, Voters in the interest of S. Crawley, Esq.

Sitting Member—H. Stuart, Esq.

Counsel for the Petitioners—

Mr. Harrison, Q. C., Mr. Cockburn, and Mr. Phipps.

Agents—Messrs. Vizard and Leman.

Counsel for the Sitting Member—

Mr. Serjt. Merewether, Q. S., Mr. Thesiger, Q. C., and Mr. Austin.

Agents—Messrs. Lyon, Barnes, and Ellis.

The petition complained of the improper rejection and reception of votes, and prayed for the seat for Mr. Stuart.

The lists exchanged were of an unusual description, some votes were objected to under three or four different classes and almost every separate class contained a variety of totally distinct heads of objection, so that in some cases a single voter had as many as thirty objections in a class raised to his vote. As the party attacking the vote was not

(1) Mr. Whitmore was excused attendance on account of illness in his family.

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required to specify the particular head in the class on which he relied, the object of 9 G. 2, c. 22, s. 14, which requires an exchange of lists specifying the particular ground of objection was effectually defeated.

Mr. *Harrison* opened the case; he stated that at the close of the poll the numbers were, for

Polhill 467

Stuart 419

Crawley 412

and that the case of the petitioners would be one of scrutiny, in the course of which the Committee would be called on, amongst other questions, to decide a new point of considerable importance, *vis.*, whether an inhabitant householder under the franchise reserved by the Reform Act who is registered for one house, and removes to another before the election, must be registered again to entitle him to vote.

Poll-books.

The poll-books were produced, and it appeared that the first thirty names had been altered in red ink, after the close of the poll, but it was proved that the alteration had been made entirely through an unintentional mistake, and that the original entries were not effaced.

Mr. Serjt. *Merewether* objected to the reception of the poll-books in their altered state, but the Committee

Resolved.—That the poll-books are sufficiently proved.

RICHARD HANN'S CASE.

Committee will entertain an objection to a vote, although third question was not put at the poll.

The voter had been registered 356 on the register, as a 10½. householder in Angel-street, and 690 on the register, as an inhabitant householder, Harper-street. This name appeared on the poll with a reference to Harper Street.

He had voted for Stuart, and was objected to for change of qualification.

Mr. *Austin* asked if proof was to be given that the third question was put at the poll.

1838.

Serjt. *Ludlow*.—Certainly not.

Mr. *Austin* then objected to the case being proceeded with.

Mr. *Harrison* contended that this was not the proper time for taking the objection.

Resolved.—That Mr. *Austin* be heard in support of his objection.

Mr. *Austin* then endeavoured to shew that this was only a branch of the great registry question, and went at length through the arguments which have been already given in the *Walsall* and *Shaftesbury* cases.

In the course of his argument, the following questions were proposed to him by members of the Committee.

1st. Could the present petitioners have put the question at the poll?

2nd. Is it equally necessary that the first and second questions should be put, as the third?

Mr. *Austin*.—The two first questions are on a different footing from the third, personation is a fraud and may be inquired into without the question having been put.

The objection that the petitioners have no opportunity of putting the question at the poll, is specious, but practically it is no objection. There is the same difficulty throughout the whole registration system. A person cannot object to a name on the overseer's list, unless he has a certain character. A voter cannot come and defend his vote before an election Committee, not because it would be unreasonable to give him such a privilege, but because it is impracticable. If at the poll, every voter could put the three questions, the poll could not be completed in a day. There is no hardship in this, the power of putting questions is given to the candidates, proper persons are appointed by each party to see that the questions are put wherever it is necessary, and thus the interests of the petitioners, and all other voters were sufficiently protected at the poll.

1838. *Mr. Harrison* was heard against the objection, and the Committee

Resolved.—That the counsel for the petitioners do proceed with the case of Richard Hann.

The *Chairman* requested that a list of the ten votes, whom the petitioners intended first to attack, should be giving to the agent for the sitting member, and that a copy of the list should be given to the Committee, which was accordingly done.

An inhabitant householder, who has removed between the registration and election, may vote without being re-registered.

It was proved that Angel-street and Harper-street were different names for the same street, that the voter Hann came into the occupation of a house in Harper-street, worth 20*l.* a year, in April 1835, and that at Lady-day, 1837, he had removed from that house, to a house on the other side of the same street, worth about 80*l.* a year. No evidence was given in support of the vote.

Mr. Harrison.—The objections to the vote are, that by his removal to a house of less than 10*l.* a year, he lost his right of voting as a 10*l.* householder. And that although he continued to be an inhabitant householder after his removal, yet he could not vote without being re-registered. The principle laid down in *R. v. Dodsworth*, (1) and subsequently recognized in the case of *R. v. Irvine* (2) is equally applicable to an inhabitant householder, as to a 10*l.* householder.

It is often a question of much nicety to decide, whether a tenement is or is not a separate dwelling-house. It depends on a great number of minute facts to decide when the occupier of a separate apartment, with a separate key, is a householder. But for the same reason that the occupier of a 10*l.* house, who quits his house between the registration and the election, and goes into another of double the

(1) *Supra*, 276.

(2) In *Rez v. Irvine*, coram Bosanquet, J., (Somerset Assizes, 1838), in summing up laid down the same law as Lord Denman in *Rez v. Dodsworth*, and the defendant was found guilty. *Ante*, 275, 276.

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value, is not allowed to vote without being again subjected to the ordeal of revision, to decide on the sufficiency of the value of the house into which he has removed; must the inhabitant householder who has removed, submit to the revising barrister, the decision, whether his new residence comes under the description of a house?

Mr. Serjt. *Merewether*.—There is no analogy between the present case and that of a 10*l.* householder. It has not been stated on what ground the voter is objected to. Twenty-eight objections are raised against his vote. He is objected to under three classes. Twelve objections are raised against him in the first class, ten objections in the second class, six in the fourth class. But let it be assumed however, that if the voter is assailable at all, he may be attacked under one of the twenty-eight objections raised against him; and that the real question respecting this vote, is whether he ought to have been registered before he voted.

One of the reserved rights of voting in Bedford is that of inhabitant householders.

The evidence does not in this case shew any chasm in the voter's right to the title of inhabitant householder. He left one house and immediately entered another, without any interruption of the continuity of his character of an inhabitant householder. Now the 33d section of the Reform Act reserves the right of voting existing at the time it was passed and the whole question turns on the meaning of that clause. Every person having a right to vote in virtue of any other than the 10*l.* qualification, is to retain such right of voting so long as he shall be qualified according to the usages and customs of the borough. This is a legislative declaration that if the vote would have been good before the Reform Act passed it would be good after.

It has been said, that the inference from sect. 58, de-

1838.

feats the right of a 10% householder, who has removed and not been re-registered but no such inference can fairly be drawn to defeat the vote of a person claiming under a reserved right. The italics at the end of the third question cannot be legitimately applied to a person voting under the reserved rights. Qualification does not always apply to the property from which it issues, but often to the personal right. The qualification of an inhabitant householder is personal and not in respect of the particular house which the voter inhabits.

In the List of Forms, schedule 1, No. 2, a list of persons (not being freemen) is given and it is there stated; "if the right of voting does not depend on property, then state the place of abode." The form given in this schedule is strictly applicable to inhabitant householders. It may be admitted that if the voter had ceased to be a householder he would have lost his franchise, but here the voter has been proved to have continued to be a householder. It is suggested that possibly the voter may only be a lodger. If that be so, let it be proved, and the objection to the vote will of course be established. But where a qualification is merely of a personal nature, it is impossible to hold that the bare possibility of the right being discontinued, can without the slightest evidence, be sufficient to disfranchise a voter.

Vote held good.

FRANCIS NORRIS'S CASE.

Where a voter was placed on the register in consequence of a claim, the Committee inquired into an objection to his

Voted for Stuart, objected to under Class 1, as not having been an inhabitant householder at the time of registration.

It was proved, that Francis Norris claimed to be inserted on the register, but his written claim was not called

for. There was contradictory evidence, as to whether any objection had been taken to the claim before the barrister, upon the question of the necessity of proof of an objection to a claim as preliminary to an inquiry by the Committee. Amongst other witnesses the revising barrister was called, who stated that he had no recollection whether there had been any objection or not, for the case being that of a claim he was bound to investigate and adjudicate upon it whether there was any objector or not. It was ultimately

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vote without
proof of its
having been
raised before
the revising
barrister.

Resolved.—That evidence be heard to invalidate the vote of Francis Norris.

It was proved that there were certain buildings at Bedford, known by the name of Harper's Charity, managed and kept in repair by the Corporation of Bedford and eighteen elected trustees who are rated for the buildings.

The occupation
of a tenement
in Harper's
alms-houses,
gives the occu-
pier a vote as
an inhabitant
householder.

That sixty-six persons occupy these buildings, who are appointed by the trustees, pay no rent or taxes and are liable to be removed on marriage, misbehaviour, or neglect to attend church at the discretion of the trustees. That the buildings are apportioned into separate dwelling-houses, and that each dwelling-house was separately occupied. And that the occupiers received certain weekly payments and allowances from the charity. It was also proved, that the voter's claim was in respect of one of these dwelling-houses.

Mr. Serjt. *Ludlow* against the vote, admitted that the receipt of assistance from the Harper's Charity did not disqualify a voter who had a right to vote; but contended that the occupation of one of the separate dwelling-houses did not confer the franchise.

The trustees are in point of law the occupiers, and the occupation of the tenants is merely permissive. The voter is not *sui juris* in respect of his occupation, nor is he rated or rateable, and such an occupation does not clothe him with the character of a householder.

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Mr. Austin.—If a burglary was committed in one of these houses, the dwelling-house must be described in the indictment as belonging to the occupier. But it is urged that the occupier cannot be the householder, because he is liable to be removed for neglecting to attend church, for misbehaviour, or for committing matrimony. Fellows of college, but for sect. 78 of the Reform Act, would be entitled to vote in respect of their rooms at elections for the boroughs of Oxford and Cambridge on their getting themselves put on the rate for 10*l.* houses, yet they are persons receiving alms, liable to be expelled for misbehaviour, liable to be expelled for matrimony, liable to be expelled for not attending divine service. The occupiers of the separate dwelling-houses in Harper's-buildings have the sole control of the outer door of their houses, and that is all which is required to make them householders.

Vote held good.

JOSEPH PICKERING'S CASE.

What held sufficient proof that a voter had become bankrupt.

Registered as a 10*l.* householder and as inhabitant householder, voted for Stuart, objected to for change of qualification, also for bankruptcy and insolvency.

Mr. Buck was called as a witness.

Mr. Serjt. Ludlow.—Did the voter become bankrupt in February?

Witness.—Yes.

Mr. Thesiger objected that this was not the proper way to prove that a voter had become bankrupt.

Chairman.—I have always understood that election Committees have greater latitude in questions of evidence than courts of law.

The Committee-room was cleared, and it was

Resolved.—That the question and answer are admissible. There had been an occupation of the premises by the

bankrupt under an allowance from the assignees somewhat similar to that in *Cockram's case, Taunton*, (1) the bankruptcy had been superseded, and the voter still occupied the premises.

1838.

Vote held bad.

GODFREY LEVI'S CASE.

Voted for Stuart, objected to for being an alien, the objection had not been taken before the revising barrister.

Committee refused to entertain any objection which might have been taken before revising barrister.

Mr. Serjt. *Merewether* objected to the case being gone into, on the ground that no objection had been taken at the registration.

Mr. Serjt. *Ludlow*.—Where the objection is a disqualification and not merely a want of qualification, the Committee may ascertain it, without its having been taken at the registration. The point has been expressly decided by the Reading Committee in the present session. (2)

Chairman.—It is inconvenient to quote cases which have not been reported.

Mr. Serjt. *Ludlow*.—In *Wilkinson's case, Rochester*, (3) the Committee entertained an objection to a Custom-house officer, which might have been taken before the revising barrister.

Resolved.—That as no objection was taken before the revising barrister to the vote of Godfrey Levi on the ground of his being an alien, the case cannot be gone into.

(1) *Supra*, 315.

(2) *Infra*.

(3) K. & O. 107.

1838.

RICHARD FITZHUGH'S CASE.

Both sides allowed to call fresh witnesses to explain contradictions in the evidence given.

A voter having given a vote for one candidate cannot return to the poll and split his vote.

Voted for Polhill and Stuart, objected to for having gone twice to the poll and voted twice.

The returning officer proved that an objection had been taken before him to this voter on the ground of his having left the booth, after having voted for Polhill, and having afterwards returned and voted for Stuart. The returning officer had heard the agents on both sides, and decided against the vote, but the vote was not in fact removed, and was reckoned in adding up the poll.

The Committee decided to hear evidence as to the facts which occurred at the poll.

Witnesses were called on both sides to prove what had occurred at Fitzhugh's polling, and their testimony being exceedingly contradictory.

Mr. Serjt. *Ludlow* applied to give fresh evidence.

Mr. *Thesiger* objected to any fresh witnesses being called, except for the purpose of explaining the contradictions between the witness who had been already called.

Resolved.—That the counsel for the petitioners be allowed to call further evidence to corroborate the testimony already given against the vote of Richard Fitzhugh, and that the counsel for the sitting member be allowed to call further evidence in support of the vote.

A great many additional witnesses were then called on both sides, but the contradictions were still unexplained.

Mr. *Thesiger* then called on the Committee to decide that on account of the contradictory evidence which had been given, the case against the voter was not sufficiently made out.

Mr. Serjt. *Ludlow* contended that it was the duty of the Committee to sift the evidence, and come to a positive decision on one side or the other. That there was no principle in law or in reason, why witnesses, in favor of a vote, should be

more entitled to credit, than those against the vote. The strong fact against the vote was, that the question had been adjudicated upon at the time, when all the facts were fresh in the recollection of the parties and the vote had been held bad.

1638.

Vote struck off Stuart's poll.

RALPH BARCHARD HAWKIN'S CASE.

Voted for Mr. Stuart, objected to under 7 & 8 G. IV. c. 37, for having been employed as an attorney.

Proof of a retainer held sufficient to destroy the vote of an attorney.

The evidence against the vote was that the voter had before the election, complained to a witness that he had not been retained, and had shortly after the election stated to a witness, that he had been retained by Mr. Stuart, and expected to be paid.

Mr. Cockburn.—Here the voter admits that he had a retainer, which in point of law, is a promise of payment on which the voter could have maintained an action. A solicitor is never engaged for a specific sum, and an implied promise arising from a retainer, is as much within the mischief of the Act of Parliament, as an express promise.

Mr. Thesiger.—It cannot be contended that if a party is proved to have been employed, proof of payment and promise of payment is dispensed with. It must be proved that the party had a promise of money, the conversation shews that he expects to be paid, and this, as far as it goes, seems only to shew that he had not such a claim of payment as he could legally enforce.

Vote held bad.

1838.

JOHN CLAYTON'S CASE.

Voter who has two rights, but is registered only for one, is bound by entry on register, unless he can prove it to have been a mistake.

Registered as 10*l*. householder, voted for Mr. Crawley, as an inhabitant householder, objected to for change of qualification.

It appeared from the evidence that the voter had left the house for which he was registered in August, 1836, and removed to another of equal value, of which he had been tenant from Midsummer, 1836.

Mr. Serjt. *Ludlow*.—The voter clearly had a good franchise as an inhabitant householder, and as a 10*l*. householder. The only difficulty is, that he did not register as an inhabitant householder, and that he is entered on the register for his old house instead of the new one. But as the objection is merely technical, and the continuation of the old entry in the register might have been merely a mistake, the voter ought not to be disfranchised.

Vote held bad.

WILLIAM HARRISON'S CASE.

Receipt of parochial relief subsequent to registration, destroys vote.

Registered as inhabitant householder, voted for Stuart, objected to for having received parochial relief subsequent to registration.

The voter was proved to have received parish relief from February, 1837, down to and after the time of election.

Mr. Serjt. *Merewether* contended, that the receipt of alms subsequent to registration did not disqualify. Before the passing of the Reform Act, a voter was disqualified if he received alms within twelve months prior to the election. The Reform Act, by enacting in section 36, that the receipt of parochial relief within twelve months

prior to the last day of July, should disqualify virtually repealed the old disqualification.

1838.

Vote held bad.

GEORGE BARHAM'S CASE.

Registered both as inhabitant householder and as 10 $\frac{1}{2}$ householder, voted for Mr. Stuart as a 10 $\frac{1}{2}$ householder, objected to for change of qualification.

When a voter is entered on the register for two rights, and on the poll only for one, he must support the one on the poll.

Chairman intimated, that where a voter is on the register in two capacities, he is bound to sustain that qualification for which he voted.

Mr. Serjt. *Ludlow*.—The effect of such a decision would be, that where a party who has a perfect right to vote is registered in two capacities, he may be disfranchised by the accident of his being entered on the poll in that right in which his vote is untenable.

Chairman.—We will reserve our decision till the point regularly arises.

It was proved that after the registration in 1835, the voter had made an arrangement with his son, by which the son was to carry on business in the house for which the father had been registered, and to give the father a portion of the profits, and that about May, 1836, the voter went to reside out of the limits of the borough of Bedford.

Mr. Serjt. *Merewether* applied to be allowed to postpone the cross-examination of the witness called against the vote, on the ground that the proper course would have been to have proved the objection taken before the revising barrister before the facts of the case were proved.

Chairman.—The more regular course would have been to have proved the objection first, and on that ground we accede to the application.

1838.

The objection was then proved, the witnesses against the vote cross-examined, and evidence given in support of the vote, but the case was not materially altered.

Vote held bad.

THOMAS WELLS'S CASE.

Importance of entry on the poll, when there are two entries in the register.

Registered as an inhabitant householder and as a 10l. occupier, voted for Crawley as a 10l. occupier, objected to for change of qualification.

Mr. Serjt. *Ludlow* asked if the Committee would preclude the parties from taking any objection except to the character in which the party voted.

Chairman.—That is our impression.

This was assented to on both sides as the rule to be adopted during the remainder of the inquiry.

It was proved that the voter had subsequently to registration, and before the election, removed from the house in High-street for which he had been registered, and in which he had carried on his business, to a house built on premises connected with those of his former house in High-street, and fifty yards distant from it.

Mr. *Cockburn.*—It is quite clear that this voter was entitled to have voted as an inhabitant householder, and if he is disfranchised, it will only be in consequence of the rule which has been laid down.

It is extremely hard that returning officers should take on themselves to deviate from the rules which the law prescribes for them, and place voters in a situation to be liable to lose their votes by putting questions to them at the poll which are not authorized by law. If a man has two qualifications in respect of which he is entitled to vote, no returning officer has a right to ask him in which character he votes. All which the returning officer has to do is to ascertain that the name is on the register,

and to ask the three questions. In the case of *Robert Henry Gibbon Bedford* (1), it was held, that a vote could not be affected by an erroneous entry on the poll of the character in which he voted. But as it was the decision of both parties to meet the wishes of the Committee as to the rule which they had laid down, he would not press this part of the case.

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He then contended that as the new house into which the voter had removed, was built on part of the premises belonging to the old, the removal did not in fact amount to a change of qualification.

Vote held bad.

CHARLES ROBINSON'S CASE.

Registered for shop and premises, Harper-street; voted for Stuart as inhabitant householder.

Mr. Serjt. *Ludlow*.—That is my case.

Chairman.—The voter is in fact qualified under the Reform Act, and is registered for a 10*l.* shop, but as we have agreed to take the poll-book as the test of the qualification under which each voter voted, the unanimous opinion of the Committee is, that we are bound by our rule, and that unless these facts are disputed the vote must be struck off. In *Thomas Wells's case* we were unanimous that the vote was good, yet we struck it off in obedience to our rule.

Mr. Serjt. *Mercwether* stated his understanding of the rule to be, that where the voter was registered twice, the Committee would bind him to the right which he had elected.

If only one entry in the register, an entry on the poll not corresponding with the register may be explained.

(1) C. & R. 87. P. & K. 139.

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The *Chairman* acquiesced in the rule as thus laid down, and stated that the Committee were unanimously of opinion, that the case did not come within the letter of their rule.

Mr. Serjt. *Ludlow* against the vote, the voter was registered as a 10*l.* occupier, and he polled as an "inhabitant householder." These are the only facts of the case, and they are sufficient to authorize the Committee to strike this name off the poll.

Gibbons's case, Bedford, (1) is the only instance of a Committee having disregarded the description of the character in which the voter polled. In the *Seaforth case*, (2) Serjt. *Kemp* went to the polling place, and said, "I vote as a freeman, and make the best of it." The Committee having decided that freemen had no votes, it was proposed to prove that the serjeant was a good inhabitant householder, but the Committee said that they could not allow his vote as an inhabitant householder after he had put himself on the poll as a freeman.

Committees have generally acted on the principle that it is the duty of the voter to see that a proper description is given, and whenever any laches or misdescription has occurred, the party has lost his vote.

It appears, from the register, that the voter had no right to vote as an inhabitant householder, and as he voted in the character of an inhabitant householder, his vote must be struck off.

This is how the case would stand if the Committee had laid down no rule on the subject; but, looking at the rule as laid down, this vote will be found to fall completely within it. It is conceded, that the rule applies to a voter

(1) C. & R. 87. P. & K. 139.

(2) Sim. 136.

1838.

who is entered on the register under two separate qualifications, and it is difficult to imagine any intelligible ground for placing a voter who is registered for two qualifications, in a worse situation than the same voter would be, if he had only been registered for one.

It would be almost an absurdity to lay down a rule, that if a voter was entered on the poll for a qualification for which he had not been registered, and which he did not possess, he might have the benefit of all the entries on the register, which could be made applicable to him, but that if he was entered on the poll for one of several qualifications for which he had been registered, he must stand or fall by that qualification, however good the other qualifications might be for which he had been registered.

Mr. Serjt. *Merewether*.—The *Seaforth* case was prior to the Reform Act, and has been overruled by *Gibbon's case, Bedford*, (1) which is subsequent to the Reform Act.

Committee.—Is not the *Bedford* case just cited much stronger against all the cases we have hitherto decided, than against the one now under consideration?

Mr. Serjt. *Merewether*.—No; in the case cited, the voter was only entered on the register for one qualification, in the cases which have been decided by this Committee, the voter was entered on the register for two qualifications, and the Committee have held, that he was bound by that character in which he chose to vote.

If a voter has a good and a bad qualification, and chooses to vote on that which is untenable, he cannot complain of being bound by the choice which he has made. But here it is impossible to say that the voter was elected to vote on an insufficient qualification, for there is no entry in the registry corresponding to the character in which he

(1) C. & R. 87.

1838. is entered on the poll, and it is only in respect of his name being on the register, that he can vote at all.

Vote held good.

The petitioners then objected to another vote, which was struck off, upon which the sitting member gave up the defence of his seat, and the usual resolutions were passed, declaring that Mr. Crawley was duly elected.

CASE XIV.

WOODSTOCK.

The Committee was chosen on the 7th day of June, 1838, and consisted of the following members :

Earl of Lincoln (Chairman), <i>Nottinghamshire.</i>	
G. Granville Vernon Harcourt, Esq. <i>Oxfordshire.</i>	Lord P. James H. C. Stuart, <i>Ayr District.</i>
Robert Otway Cave, Esq. <i>Tipperary.</i>	T. Grimston Bucknall Escourt, Esq. <i>University of Oxford.</i>
Richard Godson, Esq. <i>Kidderminster.</i>	Sir William Brabazon, Bart. <i>Mayo.</i>
Ambrose Goddard, Esq. <i>Cricklade.</i>	Sir John Yarde Buller, Bart. <i>Devonshire, South.</i>
Horace St. Paul, Esq. <i>Worcestershire.</i>	Thomas Duffield Esq. <i>Abingdon.</i>

Petitioners—

Electors in the interest of Lord J. Churchill.

Sitting Member—Marquess of Blandford.

Counsel for the Petitioners—Mr. Austin and Mr. Cockburn.

Agent—Mr. Coppock.

Counsel for the Sitting Member—

Mr. Thesiger, Q. C., and Mr. Rogers, Q. C.

Agent—Mr. Grave.

1836.

Before the Committee was balloted for, a petition was presented to the House, on behalf of the sitting member, by his agent, Mr. Grave, which was verified on oath before the House, and which stated that on the night of Friday, the 1st of June, he had sent two clerks with the lists of the sitting members, to a room in the House of Commons, described in Ley's printed direction; that the clerks had arrived at this room a quarter before twelve, but found no one there, and no directions, and that they were told, on inquiry, that the clerks of the House were gone. In consequence of this information the clerks went away, and ultimately returned, at twenty minutes to one, and finding the room closed, forced the lists under the door, where they were found next morning, at the opening of the office.

No resolution of the House was come to on this petition, but as it appeared that the party had been *bonâ fide* misled by the printed directions circulated in the house, the question was disposed of under an honorable understanding between both sides, that no objection should be taken to the reception of the lists.

Mr. *Austin* opened the case, and stated that the whole constituency of Woodstock consisted of 380 persons, of whom 315 voted, and at the close of the poll the numbers were—

Marquis of Blandford . . . 160

Lord J. Churchill 155

The case was entirely one of scrutiny,

WILLIAM BUTLER'S CASE.

Conclusive evidence necessary to disfranchise a voter.

Registered as a 10*l.* occupier; voted for Lord Blandford; objected to for change of occupation.

It was proved that the voter had occupied, up to Lady-day, the house and premises for which his name stood on

the register, that at Lady-day he removed to a house, of which Thomas Panton was the owner, and slight evidence was given to show, that soon after Lady-day the voter had been succeeded in his former house and premises, by a new tenant.

1838.

Mr. *Rogers* submitted that there was no sufficient proof that the voter had quitted the occupation of the house and premises for which he had been registered.

Vote retained.

EDWARD FATHER'S CASE.

Registered as a 10*l.* occupier, voted for Lord Blandford, objected to for change of occupation.

What does not amount to a change of qualification.

It was proved that the voter had occupied a house and premises in Killington, for which his name stood on the register for many years prior to Easter, 1838, that shortly before Easter, 1838, the voter removed to another house with his family and all his goods, and that the house for which he was registered was pulled down; at the time of the election the house was being re-built, there were some out-buildings remaining on the premises worth about 1*l.* 5*s.* a-year, and a garden and orchard worth 5*l.* a-year. The voter was by trade a bricklayer, and was employed by the landlord of the house for which he had been registered to rebuild it, and had, whilst so employed, kept his tools in one of the out-houses.

The landlord of the house, which was being re-built, was called in support of the vote, and proved that the voter had lived for a considerable number of years on the premises for which he had been registered, that he had occupied it as yearly tenant from Michaelmas to Michaelmas at the rent of 1*l.* a-year. That at Michaelmas, 1837, the landlord requested him to go out at Lady-day following, that on the 9th of April, 1838, the voter went out

1838.

and was employed by the landlord to pull down the old house and build a new house on the premises. The voter continued to cultivate the garden and have the produce of the garden and orchard.

Mr. *Thesiger*.—There is no question as to the value of the premises. The temporary alteration in the value during the re-building of a house does not affect the franchise as long as the same premises continue in the occupation of the voter. *Meyrick's case, New Windsor.* (1) The whole question is, whether the voter continues tenant of the premises till Michaelmas, 1838.

Mr. *Austin*.—*Meyrick's case* has no bearing in the present. The voter there had entered a new 10*l.* house, paid rates for it and occupied it up to the time of the election, there could be no doubt but that the voter in that case could have answered the third question at the poll.

But here there are three grounds, each of which ought to have been sufficient to have prevented the voter from answering the third question at the poll.

1st, There was no occupation at all by the tenant at the time of the election.

2d, If an occupation at all, there was no occupation as tenant.

3d, If an occupation as tenant, the part occupied was not of sufficient value.

Vote held good.

JOHN PRIOR'S CASE.

The words in 2 & 3 W. 4, c. 45, s. 27, "the clear yearly value of not less than 10*l.*," mean

This voter was objected to upon account of the insufficiency of the value of the qualification in respect of which he was registered. In the parish-books upon a valuation

(1) K. & O. 153.

made under the Parochial Assessments Act, 6 & 7 W. 4, 1858.
c. 96, the premises of the voter were entered,

Occupier.	Owner.	Gross estimated rental.	Rateable value.
John Prior.	H. North.	8 0 0	6 10 0

a-yearly value
of 10*l.* to the
landlord exclu-
sive of the
amount of pa-
rochial rates
assessed upon
the tenant.

The rate on the premises was made upon this assessment. The landlord let the premises at 10*l.* a-year, he paying the rates, taxes, and repairs.

Mr. *Austin*.—Under the 27th section of the Reform Act, the qualification of a borough voter must be of the clear yearly value of 10*l.*, above the rates, taxes, or repairs which the tenant is legally liable to pay. The rates are to be paid by the occupier, so distinctly so, that if the landlord is rated, the tenant has no vote. The rate ought to be defrayed by the voter. His tenement must be of the value of 10*l.* and charged with the rates and taxes. Here the landlord pays all the charges and though he receives 10*l.* a-year, he would not receive that sum if he had not agreed to pay these charges. The voter consequently has not a qualification of the value to entitle him to be upon the register.

Mr. *Thesiger*.—There is no dispute upon the payment of the rate. The payment by the landlord must be taken to be that of the tenant, the tenant being rated and being charged in the parish books. The sole question is the sufficiency of the value of the qualification. If the rates are not part of the yearly value of the holding, the qualification is insufficient. There has been no decision upon this point under the Reform Act. (Mr. *Godson*.—Upon the principle of this question, the *Bedfordshire case* (1) is an authority. There the question was put that parochial rates, when paid by the tenant, constituted part of the rent paid for the land, and should be considered as part of the income, in right of which the owner votes, but was nega-

(1) Rogers, 140. 2 Luders, 475, 476.

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tived.) That was a determination that the payment of rates should not be included in the amount of a charge upon land. (Mr. *Harcourt*.—What is meant by “clear yearly value.”) The 21st. section provides, that in estimating the clear yearly value of the land, above all rents and charges, parliamentary taxes, church rates, county rates, and parochial taxes, are not to be deemed charges. (Mr. *Harcourt*.—That exception applies to the county qualification, and makes the other way as regards the borough qualification. The matter was debated a whole night in the House of Commons. (1) I wished that the rating should be the test of value. It was proposed to insert the word “rent” but it was said that clear yearly value would be after all deductions. I shall be bound by the authority of any decision, but the intention of the act was as I state. In *Rex v. Framlingham* (2) one Churchyard was held to have gained a settlement by renting a tenement of 10*l.* value, the landlord receiving only 10*l.* and paying the rates and taxes. (Mr. *Harcourt*.—That case went upon his having credit for 10*l.* a-year in the parish.)

Mr. *Godson*.—The rate here was due from the tenant.

Mr. *Thesiger*.—The payment by the landlord was sufficient. The parish has nothing to do with any private arrangement respecting the hand from which it receives the money. The simple consideration is the meaning of the words “clear yearly value.” Supposing there were no rates, the landlord would receive 10*l.* a-year for the house, and the landlord here receives 10*l.* a-year, and may have no rates to pay.

Mr. *Austin*.—The case of *Rex v. Framlingham* (3) was decided upon the question of the extent of credit the pauper

(1) *Mirror of Parliament*, 1832, Feb. 3, pp. 479, 480.

(2) Burr. J. C., 748. *Burn's Justice*, 26th Ed. 567.

(3) Burr. 748. *Burn's Justice*, 26th Edit. 567.

had in the parish. But the case of *Rex v. St. Paul's Deptford* (1) was instituted in order to reverse the case of *Rex v. Framlingham*, and Lord Ellenborough, and the other Judges held that it was better *stare decisis*, at the same time doubting the propriety of the decision in that case. It cannot, therefore, be taken as an authority to interpret the Reform Act. Indeed it is the other way as an authority. But it is not necessary to overrule it. The borough qualification under the Reform Act, is to be of the clear yearly value of 10*l.*, and the tenant must be rated and pay the rates, as well as be liable to pay a yearly rent of 10*l.* 1838.

Mr. Escourt.—If section 21 applies to section 27, as it does to the former sections, no public or parochial tax is to be deemed a charge to reduce the value of the qualification.

Mr. Harcourt.—The 21st section applies to the word “charges,” used in the previous sections, in stating the county qualification. It does not apply to the 27th section.

It was resolved.—“That the words in the 27th section of the 2 & 3 W. IV. c. 45, ‘the clear yearly value of not less than 10*l.*,’ means a yearly value of 10*l.* to the landlord, exclusive of the amount of parochial rates assessed upon the tenant.”

(1) 13 East, 320. *Burn's Justice*. “Poor” 26th Edition, p. 567.

CASE XV.

DEVIZES.

This Committee was appointed upon Tuesday, May 22d, 1838, and consisted of the following members :—

Lord Viscount Eastnor, (Chairman) *Reigate.*

Richard Walker, Esq.

Bury.

Lord Teignmouth,

Mary-le-bone.

John James Bodkin, Esq.

Galway Co.

C. Denhan Orlando Jephson, Esq.

Mallow.

Joseph Bailey, Esq.

Worcester.

Sir Walter James, Bart.

Kingston-upon-Hull.

Sir Robert A. Ferguson, Bart.

Londonderry.

Sir John Mordaunt, Bart.

Warwickshire, S.

Robert Townley Parker, Esq.

Preston.

Henry Negus Burroughes, Esq.

Norfolk, E.

Petitioners—Electors in the interest of Mr. Heneage.

Counsel for the Petitioners—

Mr. Serjeant Merewether, Mr. Thesiger, Q. C., and Mr. Wrangham.

Agents for the Petitioners—

Messrs. Lyons, Barnes, and Ellis.

Sitting Member—Captain James Whitley Deans Dundas, R. N.

Counsel for the Sitting Member—Mr. Austin and Mr. Cockburn.

Agents for the Sitting Member—Messrs. Parkes and Preston.

The petition alleged among other things, that various persons had tendered their votes for H. W. Heneage, Esq. at the last election of a member to serve in Parliament for the borough of Devizes, whose names had been improperly omitted from the register of voters by the revising barristers, and praying that their names might be added to the poll in favor of the said H. W. Heneage, and that he might be declared to be duly elected and his name substituted in the return for that of J. W. D. Dundas, Esq., who ought not to have been returned.

The election took place upon March 26th, 1838, when there polled, for Captain Dundas, 109 votes, and for Mr. Heneage, 102, and there were tendered for Captain Dundas, 44 votes, and for Mr. Heneage, 64, giving Captain Dundas a majority of votes received by the returning officer, and to Mr. Heneage a majority of votes, if the grounds upon which the revising barrister had refused to insert upon the register the names of the persons who tendered their votes should be overruled by the Committee.

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JAMES SMALLBONE'S CASE.

The objection to this voter was founded upon the omissions in the parts of two rates, made on February 14th and February 18th, 1837. In these rates of 1837, there was a total omission of any description of the property of the voter rated, or of its locality. The revising barrister held that the voter was not duly rated in respect of the promises for which he had been placed upon the list of voters by the overseers, and struck his name out. At the election in March, 1838, the voter tendered his vote under the provisions of the 59th section of the Reform Act. (1)

Committee
allowed parol
evidence to ex-
plain a rate.

(1) In the case of Smallbones the *total* omission of the description of property occurred in two rates only, in many others it occurred in four or five. It was urged on the barristers at their revision, that these blanks were to be treated as so many dittos referring to the last description of property in the same column, but on their proceeding so to read them, so many contradictory and false descriptions of property resulted, as to render this mode of interpretation impracticable. This fact is not alluded to in the argument, but it is material, as otherwise it would appear that a sufficient description of property might have been collected from the rate-book itself without recourse to parol evidence. It might have been so in the example in the text, which, therefore did not raise the question of parol evidence so fairly, as most of the other cases would have done.

ELECTION CASES.

The following are the material parts of the rate upon which the objection was founded:—

Name of the Occupier.	Name of the Owner.	Property Rated.	Name and Situation of the Property.	Rental and Annual Value.	Amount at which assessed at in the pound.	Amount to be collected, at 1s. in the pound.
Rate of Feb. 14, 1837.* Widow Leonard, James Smallbones, Widow Fiallock.	Self, G. Giddens,	Dwelling-house,	Maryport-st. Sheep-st.	£ s. d. 18 0 0 39 0 0 3 15 0	£ s. d. 6 0 0 13 0 0 15 0 0	£ s. d. 0 6 0 0 13 0 0 0 9

* The rates of February 14, 1837, and of February 19, 1837, contained similar blanks. Six rates subsequent to that of February 18, 1837, were made in the year 1837, but there was no objection made to them.

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Mr. *Thesiger*.—It is admitted that unless there was a defect in the rating of Smallbones that he was entitled to vote. (Mr. *Austin*, I say he was not rated in respect of the premises for which he claimed to vote). What are the facts? It was necessary that he should be rated in order to be registered. He was well known in the borough; he had one of the largest shops in the place; he had been rated from year to year, and in eleven rates he was validly rated. There can be no moral doubt that in the rate in which it is said, he was not rated, it was intended to rate him in respect of the premises for which he was before rated and in respect of which he claimed to vote. The overseers who prepared the list, who knew the property, transferred his name from the rate to the list as a person qualified in their books by the payment of rates, occupation, and residence to be registered.

What was it necessary to establish before the barrister? The 27th section of the Reform Act, requires, that “no person shall be registered in any year unless he shall have occupied such premises as aforesaid for twelve calendar months next previous to the last day of July in such year, nor unless such person, where such premises are situate in any parish or township in which there shall be a rate for the relief of the poor, shall have been rated, in respect of such premises, to all rates for the relief of the poor, in such parish or township, aforesaid made during the time of such his occupation so required as aforesaid.” Now it is said, that Smallbones was not rated in respect of the premises he occupied, because there is a blank in the column opposite to his name in which his property should have been described, and that it is not competent to supply the omission by parol evidence.

Is the rate good in which this omission is made? *Rex v. Bromyard*, (1) it was contended that a rate was illegal and

(1) 8 B. & C. 240.

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void; but it was determined that though it might be illegal, yet as the objection on which it was alleged to be illegal, was not contained in the notice of appeal, the rate was good; it was voidable, but not void. The rate upon the face of it was defective, yet no appeal being made upon the ground of that defect, the rate was good. *Leominster case*, (1) *St. Giles, Cripplegate v. St. Mary, Newington*, (2) *Durant v. Boys*, (3) *Milborne Port case*, (4) *Mitchell case*, (5) *Fowey case*. (6) If under these circumstances the rate is good, it is good to all intents and purposes, it is good to be enforced, good to show the occupation, and good in connection with other evidence, to show the particular premises rated. Suppose the rate had been refused after the time of appeal had passed, the rate might have been levied by distress. If Smallbones had brought an action of trespass against the overseer for levying a distress, the latter might have pleaded the general issue, and would have shewn that Smallbones occupied certain premises, that he was rated in respect of them, that he was a defaulter, and that his goods were seized to discharge the rate. How could it be shewn that the premises were rated, if the rate only could be resorted to, in order to prove the fact? The justification of the overseer would fail, if by other evidence than the rate, he could not prove that the property of the voter was rated?

But though the rate is good against Smallbones, not being appealed against, yet it is said, that as he was not distinctly rated in respect of premises in Maryport-street, he is not at liberty to go out of the rate, in order to show in respect of what he was rated. It is called a case of ambiguity, and it has been involved in all the difficulties of

(1) 2 Peckw. 393.

(2) *Viner's Abridg. Settlement*, K. 9.

(3) Bur. 522.

(4) 1 Doug. 129.

(5) 1 Lud. 80.

(6) Cor. & D. 166.

cases of patent and latent ambiguities. But there was merely an error which the barrister ought to have received evidence to correct. In *Rex v. Painswick*, (1) the rating was of the landlord, "Thomas Clifford or tenant." The pauper paid the taxes and received the receipts in his own name. It was contended that the pauper was not rated, or named, or hinted at in the rate, yet it was held, that there was sufficient to notify to the parish that he was an inhabitant. How was this fact ascertained but by parol evidence? The rate gave no information and it was necessary to resort to other evidence. *Rex v. Walsall*, (2) Aston, J. said, "It is agreed that the person must be both rated and pay, and as to the manner how he is to be rated, it is clear that his name need not be inserted on the rate." What is the difference between these cases and the present, between the omission of the name of the person and of the premises? In these cases the persons who were rated and who paid the rate, were ascertained by other evidence than the rate. What were the premises rated in this case, may be ascertained in the same manner. It was clearly open to the barrister, if he entertained a doubt, to ask what were the premises in respect of which the voter was charged. The voter having a rate of the same amount as in former years, demanded of him, had no inducements to desire to see the rate, or to question its correctness. The rate being demanded of him, he must have felt satisfied that his name and premises were inserted in the rate, and that he was sufficiently rated. Ought he to have gone to the expence of an appeal in order to have certain words added, which if he had seen the rate, he would have found to be omitted; he entertaining no doubt, the parish officers entertaining no doubt, no person in the parish being igno-

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(1) Burr. 465. *Burn's Justice*, (Poor,) 658.(2) Cald. 35. *Burn's Justice*, (Poor,) 658.

1838. rant of the premises for which he was rated? The 30th section of the Reform Act, enables a party to have his name inserted in the rate, but it applies to the case, where the name is not upon the rate at all. If the landlord is rated, he may go and tender arrears of the rate to the overseer, and be rated himself. But here the voter was actually on the rate. His name was already there. If he had been omitted, if the collector had passed his door without calling for the rate, he would have been put upon an inquiry. But here there was nothing to excite suspicion. The voter was on the rate, and the rate was regularly demanded of him and paid. The 30th section does not apply to this case.

But the real and only point is the validity of the rate. If the rate was void, then there was no rate at all, and the question is at an end. If it was a good rate, it is good to all intents and purposes, good to render proceedings against him to recover it available, and good to enable him to have all the advantages of its payment. He has paid the rate; paid it for what? If in an action of trespass, evidence will be admitted to prove what premises were rated; surely the voter may give evidence to prove in respect of what premises the rate was demanded of him and paid.

Mr. Austin.—The simple question is, was Smallbones rated or not, in respect of the premises for which he claimed to vote? If he was duly and properly rated, he must be put upon the poll; if he was not duly or properly rated, his vote must be rejected. The question arises upon only two of the rates. The other rates are immaterial, for if one rate fails, the vote is bad. Mr. Smallbones was a person whose name was originally inserted in the list of voters, prepared by the overseer in 1837. He was objected to by a competent objector, and it became necessary for the barrister to ascertain the validity of the objection.

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The barrister did consider the objection, and came to the decision that the voter was not properly rated. It was sought to bring the case within the 50th and the 79th sections of the Reform Act, but the 50th section only enables the barrister to correct mistakes, or to supply omissions, in the list; and it gives him no power to amend or correct, or to interfere with any rate. The 79th section applies only to misnomers in the list, register, or notices.

The decision of the barrister was, that the party was not duly rated, in conformity with the provisions of the 27th section. He did not decide, nor is it necessary that it should be so decided, to affect the vote, that he was not rated, but he decided that he was not rated according to the requisites of the Reform Act. This was the real proposition for decision. The *Milborne Port case* and the *Mitchell case* do not apply. They arose long before the Reform Act passed, and with reference to very different questions of law to that under consideration. Rates, as respect scot and lot voters, are not evidence of title, but of being rateable, chargeable, and liable to local burthens. Whether duly made or not is foreign to their right to vote. In the *Fowey case* the question was, if a certain party was rated. The christian name of the voter was Thomas Watty, but on the rate he was inserted Francis. The form in which the rate was made, or whether he was duly rated, was immaterial. All that it was necessary to ascertain was, if Thomas Watty was chargeable. In *Rex v. Painswick*, all that was necessary to establish was the sufficiency of the notification to the parish, of the residence of the pauper. The name of the pauper was not in the rate, nor was it necessary that it should appear there. *Rex v. Wallsall*, it was also held, that the name need not be on the rate. But the decision of the barrister proceeded upon a very different principle from that expressed in these cases. It was not necessary for him to notice the principle

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of these cases. The 27th section enfranchises occupiers of houses of 10*l.* yearly value, but, at the same time, connects the franchise with conditional and exceptional provisions. The occupier, among other conditions, is to be rated; but merely being rated is not sufficient; he must be named and be rated for the very premises that he occupies. There is no analogy between this case and the cases of scot and lot voters, for it is sufficient if scot and lot voters are rateable. It has no analogy to the cases cited, of settlement, as the form of the rate was not material in their determination. But the 10*l.* occupier must be rated in respect of the premises he occupies. If a man is rated for a whole street, he would have no right to vote. The property which the party occupies, must distinctly appear upon the rate; *Res v. Aire and Calder Navigation Company*. (1) Here the question is, not *inter se* of parishioners, but of persons having the franchise. If the name of the voter is not in the rate, his vote is clearly bad; yet the necessity of his name appearing upon it, is only one of the conditions that must be complied with. The property in respect of which he is registered, must also appear upon it. Here the property is omitted, and it might as well be contended, that the introduction of a wrong property would be immaterial as that its omission is immaterial, or that the omission of the name of the voter would be immaterial. There is a competent tribunal, to which a party may appeal in these cases. He may go to the Quarter Sessions, or to the overseer, but the barrister cannot alter the rate, nor can this Committee. The objector is not bound to ascertain the name of the voter, through the occupation, neither is he bound to ascertain the property rated through the name of the party rated. Where can you stop, if the evidence offered may be received? A rate might be paid, and a settlement might have been gained,

(1) 2 B. & C. 713.

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though there was no name of the occupier on the rate; but can the barrister insert the name on the register, because the rate has been paid? How is it to be ascertained for what the rate was made? It may be for something else than a house; it may be for a road, or for other things subject to a rate, which are not connected with the franchise. It is not for the objector to see these errors corrected, but if they exist they are fatal to the right of voting for this time, and he may take advantage of them. It is a mode by which the correctness of the register is secured, and fraud prevented. According to the 27th section, this party has not been rated in respect of the premises which he occupies.

But it is said, that if the voter is not properly rated, the rate is bad and that this dilemma arises—if a good rate, he is sufficiently rated; if a bad rate, there is no question. This is not so. A rate may be good for one purpose though not for another. If the name was omitted, the voter would not be entitled to be registered, yet he might, if he did not appeal in time have to pay the rate. It fails as evidence of his title to vote, though he is liable to pay it. All that is required of the objector is to prove his objection. If he is minded to object because the party is not duly rated, the law empowers him to do so. The voter might have gone to the overseers and “in respect of such premises” as he occupied, might under the 30th section of the Reform Act demanded to have been properly rated. Not having done so, he is not duly rated for the purposes of this act, though the parish might have enforced the payment of it.

This evidence of rating might be important in certain actions of ejectment, by showing the occupation of a claimant of property. But if the rate-book contained no description of the property occupied, could the rate-book

1838. aid the evidence of title? Under the Reform Act, the rate-book is evidence of the same kind. The title to the franchise is to be established by it, and if the rate-book omits the particulars necessary to establish it, the title fails.

But it is said, that the barrister ought to have received parol evidence. The rule in these instances is a simple one. Rates must be in writing, signed and allowed by justices of the peace, and published. They are a species of record, or of *quasi* record. You cannot, therefore, explain them by parol evidence any more than you can a deed, or a record of court. If there is a patent defect in them, you cannot amend it;—if there is a blank, or a plain omission, you cannot supply what has been neglected to be inserted. The defect is patent and it must remain. If there is a latent defect it may be explained; if it is patent, it cannot be removed. Where it otherwise, what would be the consequence? The rate might be tampered with and the particulars it ought to contain would depend upon the fidelity of the memory of overseers, or upon their morals. But it is a first principle of law that you cannot add to an instrument, unless in cases of fraud which vitiates every act. If there was an ambiguity it might be explained. If in a will one John is named and there are two Johns, evidence may be given to explain who was intended. But if the name of the property or of the intended devisee is omitted, it cannot be inserted. So if Thomas Watty is rated by mistake for Francis Watty, evidence might be given to explain the error. The *Southampton case*, (1) related to the explanation of a latent ambiguity. When a person is named erroneously, it is not denied that evidence may be given to identify him.

(1) P. & K. 221.

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Then it is said, that if it was necessary to levy the rate by distress, and an action of trespass was brought against the overseer, it would be necessary in justification of the overseer to prove under the general issue, that the party rated occupied certain premises. It would not be so. It would be sufficient to produce the rate unappealed from. The rate being unquestioned, the point put of the reception of parol evidence, could not arise. *Rex v. Aire and Calder Navigation Company*, if in conformity with the notice of appeal, the rate is objected to, because the premises rated are not specified, the Court of Quarter Sessions will quash the rate. The Court will not ask if the party rated was liable to pay; it will not call the overseer and ask what premises he intended to rate; it will not receive parol evidence, but will quash the rate because parol evidence is inadmissible to supply the omissions. In the decision of the rate being bad, and being quashed—not amended—is involved the proposition that evidence to supply its defects could not be given. The revising barrister acting upon the authority of cases which he was bound to regard, decided that in conformity with the terms of the Reform Act, Smallbones was not rated in respect of the premises for which it was proposed that he should be registered. There is no hardship in the case, but if there was it is an old observation “that hard cases make bad law.” Mr. Smallbones had his remedy. He might have seen the rate, he might have asked the collector for security sake, to ascertain for him how he was rated; he might under the 30th section of the Reform Act, have sent in the particulars of the property for which he ought to have been rated. He had his remedy in various ways. But look at the hardship upon the public. What will occur in counties and in boroughs if these omissions in rates may be supplied? Every overseer will be a par-

1838. tizan, not making out his books according to fixed and known rules, but omitting what he may think proper, and relying upon his memory to give such particulars at the time of registration as may be most favorable to those in whose interest he may be acting.

It was resolved unanimously, that the vote of James Smallbones should be put upon the poll.

In consequence of this decision the seat was abandoned, and it was resolved that H. W. Heneage, Esq., was duly elected, and ought to have been returned; that J. W. Dundas was not duly elected, and ought not to have been returned, and that neither the petition against the said return nor the opposition to it was frivolous or vexatious.

CASE XVI.

ROXBURGH.

This Committee was appointed on the 6th of February, 1838, and consisted of the following Members:—

Right Hon. John Archibald Murray, (Lord Advocate) <i>Leith.</i>	
William Bagge, Esq. <i>Norfolk, W.</i>	Edward Strutt, Esq. <i>Derby.</i>
Lord William Bentinck. <i>Glasgow.</i>	Charles William Packe, Esq. <i>Leicestershire, S.</i>
James Duff, Esq. (a) <i>Banff.</i>	Sir Thomas Charles Styles, Bart. <i>Scarborough.</i>
Benjamin Hall, Esq. <i>Mary-le-bone.</i>	Colonel Sir Charles Brooke Vere. <i>Suffolk, E.</i>
William Marshall, Esq. <i>Carlisle.</i>	Charles Arthur Walker, Esq. <i>Wexford.</i>

Petitioner—Hon. Francis Scott.

Counsel for the Petitioner—

Mr. Thesiger, Q. C., Mr. Austin, and Mr. Montague Smith.

Agents for the Petitioner—Messrs. Spottiswoode and Robertson.

Sitting Member—Hon. John Edmund Elliott.

Counsel for the Sitting Member—

Mr. Serjt. Merewether, Q. S., Mr. Biggs Andrews, Q. C., and Mr. Murray.

Agents for the Sitting Member—Messrs. Richardson and Connell.

The petition of the Hon. Francis Scott, of the Middle Temple, London, barrister-at-law, set forth that the Petitioner was a candidate at the last election for the county of Roxburgh; that there were at the last election three separate polling places, one at Jedburgh, one at Hawick, and one at Kelso; that previous to and during the said election, riots of the most alarming, tumultuous,

Riots at the election.

(a) Excused attendance upon account of indisposition.

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and violent description took place in the said town of Hawick, by means of which riots, the electors, in the interest of the petitioner, were greatly interrupted, insulted, and assaulted, as well in going to as in returning from the said polling place at Hawick aforesaid, and divers of the said electors, who would have voted for the petitioner, were in consequence thereof deterred and prevented from so doing, and others were influenced by fear, threats, and violence to vote for the Hon. John Edmund Elliott, in violation of the freedom of election, and of the rights of the said electors, and of the petitioner; that the said riots were countenanced and encouraged by the partizans and friends of the said John Edmund Elliott, and by divers persons in his interest or the interest of his party, for the purpose of intimidating and preventing electors from voting for the petitioner; and in the course of their excesses, divers electors, in the interest of the petitioner, sustained grievous injury and bodily harm; that all the electors and voters, known to be in the interest of the said John Edmund Elliott, had free access to the said poll-booth, and were allowed to poll and leave the same without injury or molestation from the said mob.

Proceedings
at former
elections.

That from the experience of what took place in the said town of Hawick at former elections for the said county, which were had in the years 1832 and 1835, and from threats which had been held out, previously to the last election, to voters in the interest, or supposed to be in the interest of the petitioner, a written requisition or communication was made to the sheriff of the said county of Roxburgh by numerous voters of the same county, stating their conviction that riots and disturbances would take place at the said election at Hawick, and that the ordinary civil force was insufficient for the preservation of the peace during the election; that by authority of her Majesty's Advocate for Scotland, the responsibility

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of keeping the peace at Hawick aforesaid, during the said election, was devolved on the magistrates of the said town of Hawick; that the said magistrates of Hawick greatly misconducted themselves in the discharge of the duty so devolved upon and undertaken by them, by affording no protection or insufficient protection, to the voters in the interest of the petitioner, and treating with indifference the outrages committed upon the said voters, and so behaving themselves throughout the said election, as to destroy all confidence in their ability or desire to afford effective protection to such voters, or to preserve the peace of the said town of Hawick.

That in the course of the said first days of polling at Hawick aforesaid, on the said third day of August last, the sheriff substitute taking the poll, did, on account of the riotous and tumultuous proceedings which had already taken place, publicly declare at the polling-booth, that he did adjourn the poll for the space of two hours, but, although after such public declaration, the polling at Hawick was stopped for some time, yet the said sheriff did illegally, after a short interval, resume the taking of the poll, notwithstanding the said declaration; that the sheriff substitute at Hawick further acted illegally, in reckoning the day upon which the said adjournment was made and declared, as one of the two polling days for the said district, and in not appointing another polling day in the terms of the statute in such case made and provided, to the manifest injury of the petitioner, and of the voters who were prevented from voting at the said election. The petitioner humbly prayed, that the House would be pleased to take the premises into their consideration, to declare that the said John Edmund Elliott was not duly elected, and ought not to have been returned, and that the said election was null and void; and that justice might be done in the premises, and such relief be granted to the

Interruption
and adjourn-
ment of the
poll.

1838. petitioner and the electors of the said county of Roxburgh touching the said grievances, as to the House should seem meet.

There was no prayer in the petition against the magistrates.

Mr. Rutherford, the sheriff's clerk of the county of Roxburgh, produced the poll-books and the minutes of the election. Upon his cross-examination, he was asked, if when he went to Hawick, upon the afternoon of the first day of polling, there was any riot in the town. (1) Mr. *Austin* objected that it was an universal rule, almost without exception, that the cross-examination shall be confined to the subject matter of the examination in chief. He, however, stated that without conceding, that Mr. Serjt. *Merewether* had a right to have the witness recalled, still he would permit this witness to be cross-examined at a subsequent stage of the inquiry, upon other parts of the case. Upon this understanding, Mr. Serjeant *Merewether* forbore to press his examination. (2)

Representation of electors suggesting to magistrates before an election, measures for the purpose of preventing disturbance at a coming election refused to be received in evidence.

Mr. Rutherford was asked to put in a paper called "the Representation," signed by 95 electors. (3)

Mr. Serjt. *Merewether* objected: This requisition was signed by certain electors previous to the election and certainly does not in any degree bear upon the matters referred to this Committee. Supposing that this document was put in to shew that there was a requisition to some persons to do or not to do certain acts therein mentioned, and that the magistrates acted wrong in the course they took; is it fit or just that the evidence should be given against them of suggestions of a particular course of action, which they may have thought proper to have disregarded? The magistrates are not here to defend themselves. The

(1) Printed Min. p. 8. (2) K. & O. 339. (3) Printed Min p. 8.

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petition mentions them, but if it was intended to proceed against them, the petition ought to have referred to them in its prayer, and they ought to have received notice. They would then have appeared before this Committee, and as distinct parties they would have had a right to strike the Committee and to have had other advantages. The legislature has provided for the event of their conduct being investigated, and it would be an act of injustice to permit their conduct to be questioned in their absence. But supposing the magistrates had misconducted themselves, would their misconduct defeat the election? This document will afford no evidence respecting riots. It is a representation made, not even to the magistrates, but to other persons. It is irrelevant to this inquiry. It was made before the election commenced, and it has nothing to do, and can have nothing to do, with the obstruction alleged to have taken place at the poll.

Mr. *Austin*.—Evidence is certainly not admissible that is not relevant to the issue. But this is relevant. The election is alleged to be bad, because it took place under circumstances which made it impossible for the voters to give their votes. The circumstances that produced the interruption were the riots. It is proposed to shew, that before the election took place a systematic scheme of rioting had been resolved upon. The document produced is a representation made to the sheriff by certain electors, suggesting that it will be requisite to take certain measures of protection, because the state of feeling in the town is of such and such a description. The sheriff was the officer upon whom the duty of keeping the peace was cast by law, and to whom this representation was made. Will it be said that it is not relevant to show that there was reasonable ground to apprehend the probability of riots? In the case of *Redford v. Birley*,⁽¹⁾ arising out of the Manchester

(1) 3 Stark. R. 76, 88, and 2 Stark. on Evid. 851, 2nd Ed.

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riots, it was held that statements made to the Committee of Magistrates appointed to provide for the public security in the town of Manchester, especially their apprehension for the safety of the town, was evidence of the propriety of calling in the military in aid of the civil power. Here a representation was made to the same effect, namely, that electors would not be able to give their votes, unless protection should be afforded to them. Our charge is, that there was systematic riot, and that it was contemplated when this representation was made. Towards proving this, the representation made to the magistrates, is tendered in evidence.

Mr. Serjt. *Merewether*.—In the case cited, the question was, whether the act done by the defendant was legal, and that turned upon the necessity that existed for calling in the aid of the military. It was important, therefore, to ascertain why the military were called in. But the Committee has to ascertain if the voters were obstructed in going to the poll. If the poll proceeded, or could have proceeded in the midst of the greatest riots, the riots would amount to nothing. A show of hands in the midst of a riot may be sufficient to found a return upon, if the parties assent to it. If a poll is demanded, and no interruption in it occurs, the continuance of the riots are of no importance as regards the result of the election. If the riots were systematic, it matters not, if the poll was not obstructed. The document may express the state of feeling of those who signed it, but why should the Committee notice it. Partizans upon all sides at elections, are apt to make representations to official persons of the intentions of their opponents, and in their excitement exaggerate what they state. But are the statements of such partizans to be received as evidence? Are the Committee to form their judgment upon documents which are made by partizans, and are necessarily of a partial character?

It was *resolved*.—That the document proposed to be put in evidence, intituled “An application by certain electors,” is not admissible in evidence.

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After an argument, similar to the last, the Committee resolved not to allow certain resolutions passed at a meeting of the magistrates on July 26, 1837, five days before the nomination of the candidates to be put in evidence.

Resolutions of a meeting of magistrates previous to an election refused to be received.

It was also resolved, after hearing counsel, that a letter written by the sheriff to the Lord Advocate, previously to the election, and which the Lord Advocate (the chairman) was called upon to produce, was not admissible in evidence.

Letter written to the Lord Advocate before an election, refused.

After the last resolution was made, the Committee adjourned, and the next morning, before counsel proceeded with the case, the Chairman stated, that the Committee had instructed him to request counsel to keep in view the resolutions to which the Committee had already come, and to proceed with that part of the case which more directly related to the election.

Mr. *Austin* then offered to give in evidence a letter written by Mr. Baillie Goodfellow to the sheriff of the county, proposing on behalf of himself and Baillie Wilson, to take upon themselves the preservation of the peace of the town of Hawick.

Letter of a baillie to the sheriff, undertaking to preserve the peace of a town during an election, rejected.

After hearing counsel, to the same effect as before, Mr. Serjeant *Merewether*, in addition to his former argument, contending that Baillie Goodfellow ought to have been called, the Committee resolved, that the letter proposed to be put in, was not admissible in evidence; and that the Committee would now hear evidence to prove the fact, whether riots did take place in the town of Hawick, which

1838. obstructed the voters in the exercise of their franchise at the late election.

Evidence of the proceedings of a former election rejected.

Col. William Macdonald was asked by Mr. *Thesiger*,⁽¹⁾ in the course of his examination—"In your capacity as Chairman of the Conservative Committee, were you in Hawick some time previously to the election of 1835?"

"Yes, I was."

Mr. Serjt. *Merewether* then objected to any evidence being given relative to the election of 1835.

Mr. *Thesiger* contended that the evidence was admissible.

It was *resolved*.—That the Committee will not receive evidence to prove what took place at the previous election of 1835.

Poll-books of a former election rejected.

Mr. Rutherford was examined by Mr. *Thesiger*, and was asked to produce the poll-books of 1835. After hearing counsel, it was unanimously resolved, that the poll-books of 1835 could not be given in evidence.⁽²⁾

Canvass-books rejected.

Mr. George Potts was examined, and in the course of his examination, ⁽³⁾ Mr. *Austin* stated, that he proposed to show, by the returns of the canvass, that a majority of the electors would have polled for Mr. Scott. *Coventry case*.⁽⁴⁾

Mr. Serjt. *Merewether* objected to this evidence, and referred to the printed minutes of the *Coventry case*, from which it appeared that in that case the evidence of the kind proposed to be given, was not objected to, and was, therefore, given under circumstances, which made it of no authority. What a party may have said to a can-

(1) Printed Minutes, p. 145. See K. & O. 427.

(2) *Ibid.* 161. (3) *Ibid.* 164. (4) P. & K. 342.

vasser, what were the motives which might induce a person to promise, and afterwards to refrain from voting, could not be ascertained from the evidence tendered. Canvassing-books were full of errors and frequently represented the result of an election to be very different from that which eventually happened.

It was *resolved*.—That the evidence proposed to be given could not be received.

The important parts of the evidence relating to the general allegations of the petition are referred to in the following arguments of counsel, which are given at considerable length on account of the interest of the questions involved.

Mr. *Austin*.—The first point for the committee to consider is, the effect of closing the poll upon the first day of the election. When the state of the law and the terms of the Act of Parliament regulating the polling are considered, it will appear to be a point of very great importance, respecting which there can be little difference of opinion. The effect of the adjournment upon the first day, rendered a third day's polling absolutely essential to the validity of the election. This is a proposition which there will be no difficulty clearly and satisfactorily to establish. The Reform Act has put the law relating to the adjournment of the poll upon a new footing, and this will be the first decision made upon it. Before the statute of the 25 Geo. III. c. 84, which regulated the duration of the poll, the polling at an election, might, according to the discretion of the returning officer, have lasted an almost indefinite time. By that statute, the time of polling was limited to fifteen days, and it was to be kept open seven hours every day, between the hours of eight o'clock in the morning and eight o'clock in the evening, that is to say, seven hours out of twelve, and any seven hours out of the twelve satisfied the provisions of the act. This was

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The poll having been adjourned for two hours, on account of riots, but not notified according to the provisions of the 3 and 4 W. IV. c. 65, and re-commenced in half an hour after the adjournment, held not to invalidate the return.

1838. the first alteration with respect to the limitation of the time of taking the poll. The English, Scotch, and Irish Reform Acts are the first that give any statutable authority for the adjournment of the poll. There is no such authority given by any previous act. Before the 25th Geo. III., the poll might have been adjourned at the discretion of the returning officer. Under that act it was adjournable every day for a certain number of hours; but now the power of adjournment is specially regulated. The time during which the poll is to be taken is fixed, and the event of an adjournment is specially provided for. The Scotch Reform Act of the 2 & 3 Wm. IV. c. 65, s. 32, directs that the poll shall be adjourned for a particular cause. It is a novel provision both as respects the subject matter and the directions given. The poll, according to that section, is to be kept open for two days only; on the first day from nine in the morning until four o'clock in the afternoon; and on the second day, from eight o'clock in the morning until four in the afternoon. "Provided always, that the poll at any one place may be closed before the termination of the said two days, if all the candidates, or their agents, and the sheriff, shall agree in so closing it. Provided also, that where the proceedings at any election shall be obstructed by riot, or open violence, the sheriff, or his substitute, at the place where the riot has occurred, may adjourn the poll, at that place, to the following day, or some other convenient time, and, if necessary, may repeat such adjournment till such obstruction shall have ceased, he always giving notice to the sheriff, who is to make the return, of such adjournment having been made; and any day, where the poll shall have been so adjourned at any polling places, shall not be reckoned one of the two days of polling within the meaning of this act, nor shall the state of the poll be finally declared, nor the result of the election proclaimed, until the poll, so interrupted, shall be

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closed and transmitted, as hereinbefore provided, to the sheriff who is to make the return." This is a novel provision, and it must be clear to the mind of every lawyer, that if the poll was adjourned on account of riot, the consequences must follow, that is, the day upon which the adjournment took place, is not a day to be counted among the days of polling; there must be a third day's polling. Then, in this case, was the polling adjourned on account of riot upon the first day? Mr. Craigie's evidence is distinct upon this point. He acted as the polling sheriff for the Hawick district.

In his evidence he expressly stated that he adjourned the poll for two hours, (1) and that he felt himself called upon to do so from his own observation of the riot and tumult existing, and a written requisition signed by electors. (2) He did not wait for the expiration of the two hours, but resumed the poll in about half an hour after the time that it had been adjourned. (3)

From these and other parts of the evidence, it is perfectly clear, that there was an adjournment of the poll upon account of riots. If this was so, the circumstances contemplated by the Act of Parliament arose. It cannot be said, as it was correctly said, under the 25 Geo. III., that the words of the act being affirmative are directory only; the words in this act are not affirmative words—they are negative words. It is not said, that if the poll is suspended, another day "may" be given, but "that any day where the poll shall have been so adjourned at any polling places, shall not be reckoned

(1) Printed Minutes, p. 86.

(2) A paper signed by eighty-five electors, declaring that they would not attempt to exercise their franchise, until protection was afforded to them, to and from the poll, and stating that they had come to this resolution in consequence of observing the treatment certain electors had met with; and other papers, complaining of obstructions to the poll, and the mal treatment of electors. *Printed Minutes*, p. 83.

(3) Printed Minutes, p. 86.

1838. — one of the two days of polling within the meaning of this act." These words are negative, and amount to an absolute command. If they had been affirmative, they might have been merely directory. *R. v. Justices of Leicester*. (1) An election to be valid, must comply with the provisions of the act. If the act directs that there shall be two days for polling, and the sheriff gives but one, the election is void. If the act provides, that in case of adjournment upon account of riot, there shall be a third day's polling, and that the day of adjournment is not to be reckoned as one of the polling days, it never can be contended, that this election was valid.

The object of the Scotch Reform Act is perfectly obvious. The constituency were to have two clear days, in order that the candidates and electors might make their arrangements. Suppose there had been an adjournment upon the last day, when some fifty voters had come from a considerable distance, and that they had found the poll closed, and returned home, expecting another day's polling? Surely if another day had not been given, the election would not have been valid; yet how does such a case differ from this? We cannot draw nice distinctions. The terms of the act are not a subject of doubt, and it is not in the power of the Committee to do otherwise than follow the law. The extent of any damage, or injury, arising to any candidate by the adjournment, cannot be inquired into, where the command of the statute is distinct and imperative. There were 108 electors unpolled in this district upon the second day, and could any court, if the question of damage was investigated, declare this to be a good election? By the evidence, it also appears, (2) that so late as two o'clock upon the second day, the sheriff was undetermined if he should open the poll

(1) 7 B. & C. p. 6.

(2) Pott's Evidence, Printed Minutes, p. 163.

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another day. This puts beyond all question the fact, that the sheriff had adjourned the poll on the first day, and that he knew the effect of the adjournment. Within three hours of his finally closing the poll, he did not know if he should finally close it at the time he ultimately did. Did the petitioner, or his agents do any thing to waive this breach of the law? Did they consent to close the poll? Mr. Potts, the agent of Mr. Scott, protested against the close of the poll, and his protest is entered upon the poll-book, now before the Committee.(1) He demanded a poll for a third day, and there will be no pretence to say, that there was any waiver of the consequences of the adjournment. The simple questions before the Committee are, the facts given in evidence and the application of the law to them. What did the sheriff do, and what were the legal consequences of his acts? If he is found to have done certain acts; if he is found to have stopped the poll, no matter if it was, or was not called an adjournment, though he himself in this case calls it an adjournment; if he suspended the polling, all the legal consequences that follow the act are clear. It is true, that by the pressure of Mr. Elliot's partisans, he opened the poll, before the termination of the two hours, during which he had adjourned it; but that does not affect what he had previously done. The adjournment had been made, and the re-opening of the poll, was as great a breach of the law, not using the expression offensively, as refusing to poll for a third day. If there is a riot the sheriff may adjourn the poll. There was a riot and the poll was adjourned. The effect of this act, the law has fixed. The time during which the adjournment was made, is immaterial. If there is an adjournment, for however short a time, the poll cannot be closed upon the second day. Here, two hours were taken

(1) Printed Minutes, p. 163.

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out of the seven upon the first day ; five hours instead of seven were given, and though the sheriff was implored to continue the poll ; though his closing it was protested against, he refused to allow the electors that additional time for polling, which, under the circumstances, they were by law entitled to. He exercised a discretion in violation of the law, and the result is, that this election cannot be sustained.

Arguments as to the effect of riots on the validity of an election.

With respect to the second question, namely, the effect of the riots that occurred at Hawick, upon the validity of the election, the facts referred to are not unimportant as they express the judgment of the sheriff upon the character of the proceedings that occurred. Was the election a free one ? In the consideration of this question, the personal interests of the Sitting Member are immaterial. The interests of the constituency are alone concerned in it. He trusted he should not be considered as trespassing unnecessarily on the time of the Committee, if he commented at some length on the evidence which had been adduced in support of this part of the case ; for it appeared to him, that the question which was now under consideration was one of the most important that ever had been brought before a tribunal, like that which he had the honour to address. The decision of the Committee would be most important, not merely as it related to the late election for Roxburgh, but in its effect on all future elections in every part of the country. The Committee were called upon to decide and determine the law relating to riots and assaulting voters at elections. It would be difficult to imagine any question more interesting or important. It was not his intention or wish to complain of several decisions which the Committee had come to, the effect of which had been to cut off most important evidence in support of the petition.— He complained not of those decisions, although he must

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honestly and respectfully state that they were contrary to what he had anticipated. He thought, however, sufficient had been proved, to entitle the petitioner to have the late election declared void.

Before he entered into the details of the evidence, it appeared to him desirable to take a brief survey of the law regarding riots at elections.

In order to render elections free, the attention of the legislature in this country was very early addressed to the enactment of such laws as should secure that object. An ancient and remarkable statute upon the subject is the 3 Ed. I. c. 5, which provides that, "because elections ought to be free, the king commandeth, under penalty of great forfeiture, that no great man or other, by power of arms, nor by malice, or menace shall disturb any to make free election," (shall disturb the freedom of election). This was enacted at a time when great land-owners, under the name of barons, resorted to the hustings with a large train of dependants in order, with violence and threats, to fight out an election. Civilization has introduced a different mode of committing riots than prevailed when that statute was passed, and cases of riots at elections have been frequent in modern times, which have called for the interference of parliament. In the reports of *Perry and Knapp*, (1) are to be found collected cases of riots beginning with the year 1624, and ending with the *Coventry case* in 1827. Among them are only two instances in which the election was not set aside. The Pontefract election in 1624, was set aside. The Southwark election in 1702, was set aside, though several witnesses swore that they never knew a quieter election. Three Coventry elections in 1706, 1722, and 1736; two Westminster elections in 1722 and 1741; the Pontefract in 1768; the Morpeth in 1774; the Coventry in 1781; and the Nottingham

(1) P. & K. 338.

1838. in 1802, were all set aside on account of riots. The Coventry elections in 1827 and in 1833, are the only instances of petitions not being successful where riots have been proved. Does not this alone, shew beyond all dispute, that this matter has been always regarded with great jealousy by the House of Commons and by its Committees, whose decisions determine what is parliamentary law?

The *Coventry case* of 1833, is not very clearly reported in *Perry and Knapp*, (1) and it will strike any person to be somewhat extraordinary, that the election was not avoided upon account of the scandalous riots that took place. But it will be found, that Mr. Bulwer had 1613, and Mr. Ellice 1607 votes, that Mr. Fyler and Mr. Thomas only polled about 370, and that it appeared by reference to the register, that if all the unpolled voters had voted for the unsuccessful candidates, that majority could not have been overtopped. These considerations may palliate the decision that was made, but it was also, the fact, that the riots which unfortunately occurred, were not confined to the partisans of Messrs. Bulwer and Ellice. There was evidence of rallies, and it was questionable to the Committee which side were the aggressors. The parties were probably treated as in *pari delicto*. The Committee seem to have said, "You, the electors of Coventry, have long been discredibly notorious for your riots, for rallies, for acts of violence, for the use of bludgeons, and the Sitting Members shall retain their seats, as the electors unpolled could not have changed the result of the election."

But in another report of the same case, (2) is an explanation of the decision, which renders any suggestion of the motives of the Committee unnecessary. It appears that at four o'clock upon the first day of the election, Mr. Fyler and his colleague abandoned the contest and

(1) P. & K. 337.

(2) Cockburn & Rowe, p. 266.

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retired, without any reference whatever to the riots, and consented to the return of the Sitting Members without any protest against the validity of the election. It distinctly appears from this report that on the resignation being announced, no reference was made to the violence offered to the voters, and that the state of the poll was alone assigned as the ground of the resignation. (1) The light thus thrown on the *Coventry case* by this report in his opinion did away with its bearing on the present case, and if this be conceded, then there is no case to be found in which the election has not been avoided by proof of riots. Whether the Committee on the *Coventry case* were right or wrong, in point of law, in coming to the decision that they did, there was at least a strong justification for them to resolve, that the election had expressed the opinion of the majority of the registered electors. It was plainly shewn in the *Coventry case*, that the majority of the Sitting Members could not have been turned. If there have been riots, the least thing the Sitting Member can do, is to prove that arithmetically it was impossible the numbers on the poll could have been altered, if the polling had been continued. He ought to be required to show, as was done in the *Coventry case*, that the election could only have terminated as it did, if the poll had remained open, though such proof would not be sufficient in point of law, and ought not to be sufficient.

Let it then be conceded, for the sake of argument, that in order to vitiate an election, it is not sufficient merely to prove that there were scandalous riots, that voters were deterred from the exercise of their franchise by intimidation, that the polling was obstructed and actually suspended for a time on account of repeated instances of unprovoked aggression, outrage, and violence, committed by the partizans of the successful candidate on those who dared to

(1) C. & R. 267.

1878. vote for his opponent. Let it be conceded that such interruptions are not alone sufficient to affect the freedom of an election, but that in every case proof of such outrages however aggravated must be fortified by some further evidence to shew that the party complaining might have been damaged by the riots which occurred. On these suppositions the next question which presents itself is, what is the nature and extent of the evidence which the petitioner is bound to produce?

Is he to be called upon to prove, that but for the riots he *must* have succeeded? Is he bound to produce every unpollled voter, and to satisfy the Committee from the lips of the voters themselves, that they would have voted for the petitioner if they had not been deterred? In addition to the inconclusive and unsatisfactory nature of an investigation into the wishes and intentions of the unpollled voters, the inconvenience and difficulty of such a course were such as would deter any tribunal, desirous of having its decisions sanctioned by reason from embarking in it. If such an inquiry were entered upon, a scrutiny of the unpollled voters must necessarily follow; and each witness, after having satisfied the Committee as to his intentions must be subjected to an investigation as to his title to vote. Such a scrutiny would indeed be a novelty and unsupported by any authority or precedent in the journals or reports.

Mr. Scott does show that he might have succeeded, he shows that there were 108 unpollled electors left at the close of the poll, and the majority of the Sitting Member was only 44. It must be presumed, till the contrary is proved, that every one of the unpollled electors would have voted for Mr. Scott. If this is not presumed, Mr. Scott would be called upon to show, first, that 44 would have voted for him, and then that 33 of the remainder would have also voted for him. Why is Mr. Scott to bring up 77 electors

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from Roxburgh to prove this? Mr. Scott's party did not begin the riots. Mr. Scott has derived no benefit from them. If this proof is to be entered into at all, let those who have derived the benefit of the misdeeds which were practised have the burden thrown upon them of proving that a fair and undisturbed election would necessarily have concluded with the return of the Sitting Member. To call on Mr. Scott to produce 77 unpolled electors would be unreasonable in the extreme. The only other evidence which Mr. Scott could have offered to show that if the election had been fairly conducted the result would have been different from that which has taken place, has been tendered to the Committee on behalf of Mr. Scott and has been rejected. Mr. Scott was ready and anxious to inform the Committee of the state of the canvass, he was ready to have submitted the canvass-books of his agents to the Committee, and to have shewn that 77 of the unpolled electors were in fact in his favour. This evidence has been rejected. It is not for Mr. Scott to complain of this rejection; it was a matter of perfect indifference to his case, whether the evidence was received or not. If the evidence had been received, Mr. Scott would have shewn that but for the riots he would have been in a majority. The rejection of the evidence established a principle equally favourable to Mr. Scott, and certainly a sounder principle, *viz.* that it did not lie on Mr. Scott to give any evidence as to the majority of the unpolled electors being in his favour. In fact, this is the true principle, a principle supported by all the former cases and not contradicted by the *Coventry case*. Whenever such terror has existed at an election, in consequence of the riotous conduct of a mob as would be calculated fairly to operate upon the mind of a reasonably firm man of sound judgment, and to deter him from coming to the poll, the election is void, as not being a free election. Upon no occa-

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How does the case of riots differ from that of systematic bribery? Bribery personally affecting the Sitting Member, or affecting him through his agent, not only avoids the seat, but renders him incapable of sitting again during that parliament. Bribery affecting the voter destroys his vote; systematic bribery, not affecting the Sitting Member, not connected with an agent, vitiates the election. Upon what principle does this rest? If only 100 voters out of 1000 are affected through a system of bribery, the election is void. Why? Because when bribery has been adopted, as a system, it is impossible for any party to shew the extent to which it may have been carried. No direct evidence can be given to prove that the consequences of the bribery have been to give a majority, but the election is declared void in order to deter parties in future. But how does it matter whether the minds of electors are debauched and their consciences invaded by the suggestion of improper rewards, or their just fears are acted upon in consequence of unlawful terror? Again, the intimidation of an elector, destroys his vote, because if he is threatened he is not a free agent. Suppose systematic intimidation is proved, can it be doubted that it will avoid an election? Bribery has not so much influence upon the mind of a man as fear, and the latter affords the stronger reason to avoid an election. The presence of military at an election is forbidden,⁽¹⁾ and vitiates an election. On what principles has it this effect? No particular voter could perhaps be said to have withheld his vote in consequence of their presence, or to have voted otherwise than he would have done, if they had been absent. Yet in such cases, it is presumed, that the intimidation has been such that the election was

(1) 8 Geo. II., c. 30.

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not free. The inference from these cases is, if the freedom of election has been systematically violated, the election is void, as affording the only means to prevent the recurrence of such misconduct. Systematic terror, systematic bribery, systematic intimidation, will each of them vitiate an election, inasmuch as they each interfere with the freedom of election. The extent of the riot, in the case of a riot, is of little moment, and the extent of a particular injury nothing, as it may operate more or less strongly according to the constitution of different men. The simple question is, whether the riots were of such a description as to deter ordinary reasonable men, who were desirous of giving their votes to Mr. Scott, from going to the poll.

He would now briefly call their attention to the more important facts connected with the riots at Hawick. What is the evidence of Mr. Barton, a sincere moderate intelligent witness, who had himself voted for Mr. Scott, (1) or that of the sheriff substitute, Mr. Craigie, who was of opinion that Mr. Scott's voters could not have come to the poll with safety? It was proved that no less than forty-six electors were attacked, with more or less malignity and mischief in the course of the first day's rioting, the lives of many were in danger, and others were treated with insults so degrading, and with such contumely that it was impossible that they should go to the poll, or that others should attempt to poll who heard of the proceedings. Oliver and Tully, voters, had their clothes torn off, and were left almost naked, and were thrown into the river. Mr. Benwick was most dangerously injured. Mr. Elliot was thrown

(1) He says, in answer to a question by the Committee, whether he would have thought it safe to have voted on the Friday. "No; considering what I saw on Thursday, and the temper of the multitude on Friday, I not only should have thought it not safe, but three of my parishioners came to me and asked me if I considered it safe, and I said to them I did not consider it safe; and if I had not polled on Thursday, I would not have gone to the poll on Friday." *Printed Minutes of Evidence*, p. 144.

1838. from his horse, had one of his fingers of his right hand mutilated by a cutting instrument, was struck on the temple, thrown across a wall, and taken up insensible. Other persons were also shamefully maltreated. The riots were entirely on the side of the Sitting Member, entirely against the voters of the petitioners, and no protection to them was afforded. It was not a particular riot at ten o'clock in the morning, or at three o'clock in the afternoon, or at any particular hour of the day, but a continuous riot from the time that the poll opened on the first day, until it closed. In fact, there was a premeditated plan of carrying the election by outrage, and the riots were continued till the object was attained. Even the voters who were induced to go to the poll, after the adjournment, by fallacious promises of protection, which were never kept, were exposed to gross outrages, which continued to increase in violence until the parties were deterred from going up at all. Looking at the poll-book, it will appear, that at the time of the adjournment, there is column after column in favour of Mr. Elliot. When the poll was re-opened, there were numerous voters for Mr. Scott, until the name of Patterson was reached, after which there is no vote given for Mr. Scott. How was this? Patterson was more brutally assaulted than any other person had been. (1) The same thing happened in another booth, with reference to the vote of Dick Young; there certainly are eight names of voters entered for Mr. Scott, on the poll-book of that booth, after the name of Young, but it has been proved that every one of those eight persons left the booth before Young. When Young left the booth he was brutally assaulted, (2) and from that time there is a perfect blank in the entries in favour of Mr. Scott. After this is it to be asked if Mr. Scott's chance of being returned was prejudiced by the riots? Can any one doubt that if the mob were of such a

(1) Minutes of Evidence, p. 68.

(2) Ibid. 48.

character as the witnesses have described, voters must have been deterred? Can an election be said to have been free, at which no voter could proceed in safety to the poll, unless he went arm in arm with the uncle or brother of the candidate against whom he was about to vote? 1838.

It has been proved that before the election, voters came stealthily into the town of Hawick overnight. That brave and strong men dared not shew themselves in the town by daylight for fear of being injured. That some of those who lived in the town were obliged to go to the Tower Inn overnight, to enable them to vote; that some of the voters who were at the Tower Inn, left the town without daring to vote at all. Did not men after having voted, escape in the garb of constables, and in other disguises, to avoid the punishment which had been awarded by the mob, to all who were proclaimed by their fugleman, stationed in each booth, to have voted for Mr. Scott? Can such an election be called free?

On the trial of certain of the rioters, at Hawick, before the Justiciary Court, (1) Lord Cockburn observed, "that he knew not what that freedom of election was, which consisted in this, that when he had given his vote according to his own opinion, he might be turned out in the streets of his native city, in the plight that had been alluded to, a situation so degrading, that there are thousands of men, perhaps the majority of mankind who would take the lives of their assailants, and willingly lose their own rather than submit to it." "Those proceedings were directed against and manifestly intended to have the most

(1) Reported by Mr. Swinton, Advocate. Mr. Serjeant Merewether objected to the judgments of the Lords Justiciary being read, distinguishing the statement of a judge in passing sentence on a prisoner, from a judgment upon a point of law. The Lord Advocate said, that upon the treason trials at Glasgow, he was interrupted by Lord Chief Baron Shepherd when quoting to the jury a speech of Lord Mansfield upon a similar occasion. Mr. Austin contended, that he was regular in reading Mr. Swinton's report.

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positive interference with the freedom of election. They were measures not only of a most disgraceful and indecent nature towards the individual assaulted, but the proceedings themselves were manifestly intended to have an influence on the freedom of the election, because the evidence on the case establishes this, that those proceedings commenced so early as the hour of nine o'clock, upon the morning of the first day of polling, and were continued down to the hour of seven o'clock in the evening, long after the polling had closed for that day. Having exhibited such hostility, for what purpose could the proceedings be resorted to, but for the purpose of deterring all decent and honourable electors from taking any further proceedings in the election at that time, and to impress on them the feeling, that they could only do so by the risk of encountering similar treatment to that which had been exhibited in the course of the first day. They were, therefore, in my opinion a direct and manifest interference with the freedom of election." The learned judge meets this question—there was a second day's poll and no riot on that day, how therefore can you estimate the effect of the violence of the first day? When the mob knew that the majority for Mr. Elliot was secure, and that the alarm created had been sufficient for their purpose, the second day was quiet. They would have gone on rioting the second day, as well as the first, if it had been necessary; but the *opus operatum* of the first day, rendered it unnecessary to continue their exertions on the second day.

What then will be the answer to this case? Will it be said that the voters were not attacked till they came from the poll? Such a statement is not consistent with the facts, for Scott, Oliver and other voters were attacked before they went to the poll. But even if it were true, that no voters had been attacked till after they had come from the poll, could anything be more calculated to

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effect its object than such a course. What could be more effective than the law promulgated by the mob—death to every man who has voted for Mr. Scott. The mob did not know their proper victims till their votes were recorded.

Will it be said that the riots were not general, but were only directed against particular individuals? There is no foundation for such an observation, but if it were true, the fact that 46 individual voters have been proved before the Committee to have been grossly and outrageously attacked must surely be sufficient to make the riot of a general character, and to shew that it was not against the individuals, but against the supporters generally of Mr. Scott that the riots were directed.

Whatever answer may be attempted it will be hardly possible that it should be successful, without affording a dangerous precedent upon a subject of vital importance to the freedom of elections. It may confidently be asked, that the election be declared void, both on account of the adjournment and the neglect to continue the poll for a third day, and also upon account of the riots that had taken place. There is a charge in the petition upon an incidental matter, which as a Committee of the House of Commons, and not as an election committee, it would be their duty to report; namely, upon the conduct of the magistrates. Great neglect and incapacity upon the part of the magistrates had been proved. Their conduct ought to be reported to the House, as in the *Coventry case*, (1) in order that the risk may never again be incurred of having the peace of the town devolved upon persons incompetent to maintain it.

Mr. Serjt. *Merewether*.—The first part of the argument against the return of the Sitting Member, relates to the adjournment of the poll by Sheriff Craigie upon the first day

(1) C. & R. 289. P. & K. 344.

1838. of the election. It is, therefore, material to ascertain, accurately, what the facts relating to it were. In his letter to Lord Lothian, written at the time as a memorial of the proceedings then taking place, the sheriff states that he had not adjourned under the statute, but that there had been merely a temporary suspension of the poll. (2) The effect of what he did was merely to suspend the poll for a certain time. The application for it was made by the friends of Mr. Scott and they merely asked for an adjournment of a temporary nature. It has been thought to be important to refer to the early state of the parliamentary law respecting the adjournment of the poll, and to allude to the alteration made by the Reform Act as a novelty. But this power of adjournment is no novelty, it is founded upon the Irish Act of the 35 Geo. III. c. 29, s. 12, which shows what was the intention of the act in allowing of this species of adjournment. "That if any person or persons, shall violently, riotously, or outrageously disturb, or interrupt any election, or the proceedings of the poll, such disturbance, riot, or misbehaviour shall not be any excuse to the returning-officer or officers, nor afford him or them any pretence for closing the poll, or making a return; but the Court shall thereupon be adjourned for some convenient time, as the occasion may require, and if necessary, shall be further continued by adjournment, from time to time, until such disturbance shall have ceased."

(Mr. *Austin*.—That is an Irish statute before the Union.)

It was. In answer to another observation, I would

(2) Examination of Mr. Craigie by Mr. Serjeant Merewether. I ask you whether this which took place was only a temporary suspension of the poll in consequence of the discussion that took place, or was it an adjournment intended by you under the act?—"I did not conceive it an adjournment under the act; I did not intimate it to the sheriff, an adjournment being to the following day."—You acted in no respect as if it was an adjournment under the act?—"My opinion varied at times upon the effect of it, but I ultimately came to that opinion, and did not, therefore, intimate it."—*Minutes*, p. 101.

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state that the 25 Geo. III. c. 84, which has been cited on the other side has nothing to do with the present inquiry, for that was an act limited to England alone; in Scotland, elections notwithstanding that act, might have been continued during such time as the returning-officer thought fit. The adjournment, also, referred to in the Scotch Reform Act, does not relate to every adjournment, nor is every adjournment to render polling on a third day necessary, it merely relates to an adjournment under the act. The words are, "that where the proceedings at any election shall be obstructed by any riot or open violence, the sheriff or his substitute, at the place where the riot has occurred, may adjourn the poll, at that place, to the following day." This provision relates to the actual interruption of the poll, in order to correct an evil that may exist at a particular place. It only gives a special power to adjourn at the place where the polling is interrupted. The ordinary power of adjournment is left as it was. If there is an adjournment to the next day, then the part of the day on which the adjournment takes place is not to be considered as part of a polling-day, "and if necessary (the officer) may repeat such adjournment until such obstruction shall have ceased—he always giving notice to the sheriff, who is to make the return of such adjournment having been made." Notice is to be given to the sheriff. Why? In order that parties may know of the adjournment, and that it was no longer necessary for them to attend, and the information is to be given to the sheriff, in order to regulate his proceedings accordingly. A further part of the provision of the statute is, "and any day when the poll shall have been *so* adjourned," not any day when the poll shall have been adjourned, but any day when the poll shall have been "*so* adjourned at any polling places, shall not be reckoned as one of the two days of polling within the meaning of this Act." (2 & 3. W. IV., c. 65. s. 32.)

1838. If the poll is interrupted that it cannot be carried on, the sheriff may stop it for a day, giving notice ; but unless the adjournment is according to the form and the direction of the act, it is not such an adjournment as to prevent the day on which it occurred being reckoned. The act did not take away the general power of adjournment previously belonging to a returning-officer, and therefore, it was material to ascertain from Mr. Craigie if he intended to exercise the special powers given by the Reform Act or not. He said it was not his intention to do so ; and if he had not given this answer, it would be clear from the facts of the case, since the adjournment was not made in the manner required by the statute. What the sheriff did at the moment, was no doubt the result of an honest conviction on his part of the propriety of what he did. A statement was made to him, which he afterwards found was not correct, and he therefore determined to proceed with the poll. "One of the elements of my determining to adjourn the poll was the information that Lord John Scott and Mr. M'Donald were in the possession of the crowd, but finding they were in safety, I directed the poll to go on."

A distinction has been drawn between affirmative and negative statutes ; the one being said to be directory, and the other compulsory. It is not applicable to this case. If Mr. Sheriff Craigie had stopped the poll on the first day and had then adjourned it for the day ; if he had made it a mutilated day and had not concluded the poll for that day, a third day's poll would have been necessary. This is the plain construction of the statute. But supposing it should appear that a third day was not necessary—suppose all the voters had polled, there is no doubt that the omission of the officer, in not having given a third day, would be no ground to set aside the election. Admit, however, that the words in the act are negative, and therefore imperative, still it is an acknowledged principle in parliamentary

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law, that the act of an officer, in the course of an election, is not sufficient to defeat an election, unless it is shown that some consequence resulted from it injurious or inconvenient to the parties. If the sheriff makes a slip, a party is not entitled to say that the election is void and ask to have it set aside. All these officers are ministerial, and their acts cannot be taken advantage of to avoid the seat, even though they should not be done in the precise manner marked out by the law. It is, therefore, not sufficient to show that an act was imperative and ought to have been done, unless there has been a consequence flowing from the omission of it, which has affected the rights of any of the parties.

It has been said, the objection to the closing of the poll was not waived. Now if the party meant to avail himself of any objection of this nature, the time for doing so, was the moment when the adjournment took place. If he had gone back to the poll and said, "Do not go on with the poll, you can proceed no further, or there must be a third day," something might have been said in favour of the objection. But nothing of the kind took place until the second day, when the agents of Mr. Scott agreed to make a protest, carried it to the polling-place, and there left it.

The facts then were ; the sheriff states "I adjourn the poll for two hours," and he or some one else stated, that the books were never closed. An interruption of half an hour took place. The poll was then resumed. It was asked if 115 voters had not polled after Mr. Potts and Mr. Oliver were in the booth, (they being both agents of Mr. Scott) and there can be no doubt of the fact, for from the very excellent mode in which the poll is taken in Scotland, the finger can be put upon any part of the poll-book and the numbers at any particular time can be ascertained ; and it appears that at the time Douglas's vote was entered, that 49 votes only had polled for Mr. Scott ; and at the

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end of that day's poll 105 had voted. There were, therefore, 55 polled in that single booth after the adjournment had taken place. In the other booth, 60 will be found to have polled for Mr. Scott after the adjournment. That is, 115 votes were polled for Mr. Scott, in the presence of both his agents, at the same booth, in the two books, on the same day and before the election closed at the usual hour, and during that time not a single word was said of a third day for polling. There is, therefore, abundant proof of the waiver of any objection to the polling. The adjournment was made upon the application of Mr. Scott's agents and it would be a most monstrous position, if a candidate should be at liberty, through his agents first to obtain a temporary adjournment, and then to set aside the election on account of the slight interruption which occurred. And if such a power would be objectionable in any case, it would be especially so in the present, where the sheriff hastily said, "I adjourn the poll for two hours"—not because of obstruction—for there were voters on both sides in the booth, and the polling soon afterwards re-commenced—and half an hour afterwards, finding voters coming up and anxious to poll, re-opened the poll. But there is in fact no pretence for saying, that the sheriff could have given a third day. He could not give it unless he adjourned under the act. This he did not do, and there is no entry on the poll of the adjournment. The object of the clause in the statute is not to extend the election over the whole of two days, but merely, that the poll shall not be kept open more than the time specified. If, in any day, the poll is broken off and ceases for that day, then there is to be given an additional day. But from the nature of this case it was impossible for the sheriff to have given a third day—he had not acted under the statute—it was not his intention to do so—his intention is denoted

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by his acts—he made no memorandum in his books—the poll was continued that day—and there not being an adjournment under the statute, the consequence did not, and could not arise, that a third day should be given. An adjournment for half an hour for the convenience of all parties would be equally a ground to set aside an election as the adjournment in this case.

Then as regards the cases cited respecting riots. In these cases the riot did actually interfere with the freedom of election and the majority was against the party returned. The person who had the majority, had not an opportunity to take up his voters, the voters were driven from the poll, and gross violence was used in the sight of the returning-officer, and upon the face of the poll the return was erroneous. In the *Morpeth case*, the riots did not avoid the election, but the returning-officer, being compelled to put into the return the name of a party who had not the majority, the Committee ordered the return to be amended. The election was not set aside. In the *Coventry case* of 1781, it appeared that the sheriffs themselves created the riot in order to prevent the return of Colonel Holroyd, who was seated on petition, and the sheriffs were committed to Newgate. The election was sustained. So again in the *Coventry case* of 1827, though gross violence, really over-awing the minds of the people was committed, the election was not set aside. In the *Galway case*, in 1827, the riots prevailed to the greatest possible extent, but petitioner was seated, and the election was upheld. Parliamentary law is this—riots do not set aside an election unless there has been no opportunity of taking the sense of the voters. This petition puts the law correctly—there was a riot which prevented the sense of the electors being taken. This is what ought to be established. It ought to be proved that the poll could not go on, and that votes could not be given. The *Coventry case* of 1834 esta-

1838. blishes this very principle—where there is a majority clearly ascertained, or where, in other words, the sense of the electors has been taken, there, notwithstanding the riots, the election will be supported.

But what is the consequence of riots since the introduction of the clause respecting them in the Reform Act? If there are riots sufficient to interrupt the proceedings, the sheriff is at liberty to adjourn the poll. In Irish elections the law appears to be, that riots shall be no excuse for closing the poll. But all the acts proceed on the principle, that no sheriff shall interrupt the election, or make a return that he cannot proceed to the election on account of riots. Whenever he finds the poll is interrupted, it is to be adjourned until the obstruction is removed, and then the poll is to re-commence. Since the introduction of these clauses into the Reform Acts, it is the clear and distinct law of parliament, that riots of themselves are not to interfere with an election. If a riot occurs that amounts to an actual interruption of the poll, then the sheriff has a power granted to him, by which he is enabled to avoid any thing but a temporary interruption of the poll, and then to proceed with the poll, and to make his return.

This was also the old law of parliament. The resolution in the *Pontefract case* of 1624,(1) was, "*Fifthly*, that the poll being duly demanded, and not effectually prosecuted, whereby it doth not certainly appear who had the most voices of the due electors, the election is void." Now, does that appear in this case? Was the poll interrupted? Was it not continued on the second day, and was there the slightest interruption? Was there any period during which the votes tendered for Mr. Scott were not recorded? The *Pontefract case* only establishes the

(1) *Glanville's Reports*, p. 143.

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position, that riots avoid an election when the proceedings have been interrupted, and the poll not effectually had. If the poll cannot be brought to a satisfactory conclusion, that is a ground for avoiding an election, and if the cases upon the subject are gone through, it will be found, that the riots that took place were actual interferences with the progress of the poll.

In the *Southwark case* of 1702, it was alleged in the petition, "that the poll began and continued to the next day in the afternoon, at which time the petitioner had some hundreds who came to poll for him, but a great riot was begun," and so the poll was interrupted, "so that the petitioner, who could otherwise have polled a majority of legal votes, and those that came to poll for him, not thinking themselves safe, were necessitated to quit the place of polling." (1) The Committee resolved, not merely that there were riots, but "that it had been committed by the servants of, and the agents for Charles Cox, and John Chomley, Esquires." The poll was interrupted by the act and interference of the Sitting Members, and, therefore, this was a strong reason to set aside the election, but it was set aside, because the petitioner could not claim the majority, inasmuch as the majority, who had not in point of fact voted, could not come to the poll.

In the *Coventry case* of 1706, the petition charging many illegal practices, as well as riots and tumults, was from freemen and does not appear to have asked for the seat for any party. It was a void election, but evidence to a great length was given of improper conduct of the Sitting Members. In the *Coventry case* of 1736, the poll was discontinued. In the *Westminster case* of 1741, riots were alleged, but no evidence of them given. The complaint that was pressed, was the needless introduction of soldiers, and the

(1) Carew, 145. These extracts, Mr. Serjeant Merewether, stated to be collected with great accuracy.

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closing of the poll. In the *Pontefract case* of 1768, the Sitting Members did not defend their seats, and the charges of the petition were, therefore, admitted. These cases support this proposition, that riots of themselves, however illegal they may be, do not destroy an election unless the progress of the election is prevented. It ought to be shewn to contradict this, that there is no case on which the election has been sustained, after proof of riots had been given. But the language of text books, is "unless the proceedings were actually interrupted," (not suspended,) "a riot will not affect the event of an election." (1)

"Riots at an election," says Mr. Serj. *Heywood*, "may by possibility be so outrageous as to excuse the sheriff in making a special return, but this we may safely lay down, that they must be such as the House shall resolve sufficient to prevent the sheriff proceeding with the election." (2) This is almost the language of the legislature in the Reform Act, the words being, "that where the proceedings of any election shall be obstructed by any riot or open violence, the sheriff or his substitute, at the place where the riot has occurred, may adjourn the poll." Riots may destroy an election if they interfere with the result, and prevent the sense of the electors being taken. In the *Coventry case* of 1827, many persons who offered and tendered their votes were actually prevented by force, applied to them at the moment of offering to poll. The election was held good, though the fact of the riots was distinctly proved by the committee. No case, also, can be more strong than that of the *Coventry* of 1833. Notwithstanding there were rallies on both sides, and a distinct resolution of the committee that there were extensive riots, and that the magistrates were to blame, yet as the sense of the electors was taken, the election remained good.

(1) Rogers. 5th edit. p. 222.

(2) Heywood on County Elections, p. 580.

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It is said that it is to be inferred that upon account of the riots, the 408 unpolled voters in the Hawick district, would have polled for Mr. Scott. Was it ever heard that at any election all the voters were polled out? Some must be kept away by illness; some by business; some by a determination not to vote, or an unwillingness to vote. A variety of causes of this kind must operate upon the minds of a considerable proportion of voters. But there are means to try the value of the argument. The other polling districts of the county will give a test to ascertain the number of voters who ordinarily absent themselves from the poll. Out of 645 voters in the Hawick district, 108 did not poll; out of 699 voters in the Jedburgh district, 111 were unpolled, and in the Kelso district 83 out of 520. The relative proportion of persons unpolled in each district is, therefore, very nearly the same.

It was asked, if 77 voters, who it has been said, might have been favourable to Mr. Scott, ought to be called? If it had been alleged on the face of the petition, and it could be shewn that a majority would have voted for Mr. Scott, or that they stayed away from fear, the petitioner would have been entitled to succeed, and the Sitting Member would have lost his seat. The only attempt to do this, has been in the case of one Sheil, who lived only two miles from Hawick, who met with no violence, but acted upon some information he had received. Cases of this kind, do not so much depend upon what is proved, as upon what is not proved. If a person takes upon himself to establish certain facts, and goes to a certain extent and then stops, he avows that he cannot go further. Evidence of the proceedings alleged and of the effect of them, ought to have been continued to some extent, at least. It is true, evidence was tendered of the result of the canvass, and it was rejected, because it was clearly inadmissible. There was

1838. no hardship in this, for the parties must have known that it would be rejected.

It is said that systematic rioting, does not differ from systematic bribery, or the interference of military. But there was nothing that occurred at the polling like systematic rioting. There can be no doubt that all the cases of rioting, and of the persons attacked have been proved. Supposing 46 persons were assaulted, still there were no less than 222 persons who voted for Mr. Scott, and who left the town without the slightest obstruction being offered to them. There were cases of individual assaults, but there was no systematic rioting. (Mr. Serj. *Merewether* then went into the facts of several cases.) There is only one case of systematic bribery to which systematic rioting can be likened. Bribery could not be brought home to the candidate, but it was shewn that there was an inn opened, where every voter was called in, a book was looked at and a sum of money was paid to him. One after another voters were paid in this way, from day to day, and then it was properly said, "can this be called a free election?" But that case is distinguishable from the present. It cannot be expected that a man who has received a bribe will come forward and disclose his crime; but if a man has been frightened and alarmed, what prevents his giving evidence?

Again, the calling in of the military, will not defeat an election. In the *Westminster case*, (1) the resolution was that it was a high infringement of the freedom of election, not that it avoided it. Sheriff Craigie has said in this case, that the Riot Act ought to be read as a *dernier resort*. This was not done, and it would have been an improper thing to have read it, and to have suspended the poll permanently. If Lord Lothian had not acted with the caution

(1) In 1741.

he did, and the military had been brought in before the close of the poll, it would no doubt have been said, "that this election was void on account of their interference."

1838.

Mr. Serjt. *Merewether* also went very minutely into the papers signed by electors and other documents which had been given in evidence, and contended, in answer to the imputations which had been thrown out against the magistrates, that there had been nothing objectionable in their conduct.

It was resolved.—That it appears to this Committee, that at the late election for the county of Roxburgh, riotous and tumultuous proceedings took place, in consequence of which, according to the evidence produced before this Committee, prosecutions were instituted in the Justiciary Court of Scotland, upon which prosecutions certain of the offenders were convicted.

That the Committee are of opinion, that the riots were not of such a nature, nor of so long a duration, as to prevent the votes of the electors of the same county of Roxburgh, being taken in the matter of such election. (1)

That the Committee do not consider that they have sufficient evidence before them, to induce them to make any special report upon the conduct of the magistrates and police at the said election. (2)

That the honourable John Edmund Elliot is duly elected to serve in this present parliament, for the county of Roxburgh.

That neither did the petition of the honourable Francis Scott, nor did the opposition to the said petition appear to be frivolous or vexatious.

(1) It was put and negatived by six to three. That the election for the county of Roxburgh is null and void, by reason of the adjournment and premature final close of the poll at Hawick, whereby the electors of that district were deprived of a portion of the period, allowed by law, for the exercise of their franchise.

(2) This resolution was not reported to the House.

CASE XVII.

EVESHAM.

The Committee was chosen on the 8th of March, 1838, and consisted of the following Members :—

Sir Robert Peel, Bart. (Chairman), <i>Tamworth.</i>	
Sir Hugh Purvis Campbell, Bart. <i>Berwickshire.</i>	Hon. James Yorke Scarlett, <i>Guilford.</i>
Colonel Hugh Duncan Bailie, <i>Honiton.</i>	John Walbanke Childers, Esq. <i>Malton.</i>
John Collier, Esq. <i>Plymouth.</i>	J. P. Plumptree, Esq. <i>Kent, E.</i>
William C. Harland, Esq. <i>Durham.</i>	Lord Ashley, <i>Dorsetshire.</i>
Jasper Parrott, Esq. <i>Totnes.</i>	Hon. Francis H. P. Berkeley, Esq. <i>Bristol.</i>

Petitioners—Electors in the interest of Lord Marcus Hill.

Counsel for the Petitioners—

Mr. Cockburn and Mr. Rushton.

Agent—Mr. Coppock.

Sitting Members—George Rushout Bowles, Esq. and P. Borthwick, Esq.

Counsel for Mr. Borthwick—

Mr. Thesiger, Q. C., Mr. Austin, and Mr. Banks.

Counsel for Mr. Rushout—Mr. Talbot.

Agents—Messrs. Foster and Evans.

The petition contained allegations of bribery and treating against both the Sitting Members, it also complained of the want of qualification of Mr. Borthwick, and of the improper reception at the poll of votes for the Sitting Members, and it prayed that the return of the Sitting Members or one of them might be set aside, and that Lord Marcus Hill might be declared duly elected.

The election took place on the 25th of July, 1837, and the numbers at the close of the poll were, for 1838.

Mr. Rushout	. . . 168
Mr. Borthwick	. . . 166
Lord Marcus Hill	. . . 156

The poll-books and register of voters were produced.

Mr. *Cockburn* after having opened the case against both the Sitting Members, on the ensuing day on entering upon the evidence abandoned the case against Mr. Rushout.

The part of the case first entered upon on the part of the petitioners, was the charge of personal bribery against Mr. Borthwick. The charge of bribery divided itself into two parts. The gift of a snuff-box to a voter of the name of Pearce and the offer of a gift of money to another voter of the name of Clements; with regard to the first part of the case the proof was as follows:—

Charges of personal bribery.

A shopman of Messrs. Storr and Mortimer, proved that on the 10th of July, 1837, he went to the house of Mr. Borthwick, according to order, and took with him some silver snuff-boxes, which were shewn to Mr. Borthwick, who selected one, which he said was intended by him as a present to an old schoolmaster, he gave directions that his own crest should be engraved on it with the following inscription:—" *Ebenexer Pearce, ex dono amici sui qui conducit*;" (1) that this snuff-box was sent about a fortnight before the election by the mail, by Mr. Borthwick's instructions, addressed to "Charles Best, Esq., Bingham, Evesham, Worcestershire." The price of the box, engraving and case was 7*l.* 5*s.* 6*d.*

Early in July, Mr. Borthwick told Ebenezer Pearce that he had a snuff-box for him which had been at Rundle and Bridges for him for some months.

The voter himself was examined, and stated that

(1) " *Qui conducit*," was stated to be Mr. Borthwick's motto.

1838. Mr. Charles Best, who was an attorney at Evesham, in Mr. Borthwick's interest delivered the box to him, with Mr. Borthwick's compliments, on or about the 14th of July, a week before the election. That he had not received the snuff-box when Mr. Borthwick first mentioned it to him, which was about a fortnight before the election; that subsequently, and before the election, he received the snuff-box, and that Mr. Borthwick canvassed him three or four times after he had received it. The voter said to Mr. Borthwick, that he could not vote for him unless Lord Marcus Hill was safe, and in fact, he did not vote at all at the election. On behalf of the Sitting Member it was elicited that the voter at the previous general election in 1835, had been a supporter of Mr. Borthwick's, and that upwards of a year before the election the voter, on observing Mr. Borthwick's carriage and arms, had expressed a wish to have the crest and motto engraved on a snuff-box. It appeared that this observation had afterwards been made matter of conversation, and that in the summer of 1836, Mr. Best had told witness that he would have his snuff-box. On the other side it was shewn, that at the election for a single member, last preceding the present, in Jan. 1837, the voter had voted for the candidate who stood on the opposite interest to that by which Mr. Borthwick was supported on the present occasion.

Evidence was also given to establish another case of personal bribery against Mr. Borthwick, in the case of a voter of the name of Clements.

The voter, Joseph Clements, was examined and swore that before the election in 1837, he was tenant to one Rudge of some land at Evesham, at the yearly rent of 36*l.* 6*s.*, that Mr. Thomas Pearne, a grocer, at Evesham, was agent to Rudge, that the voter went to Mr. Pearne on the 19th of July, 1837, and paid him 12*l.* 3*s.* in part

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of 18*l.* 3*s.* then due for rent. Mr. Pearne after receiving the rent canvassed him for Mr. Borthwick, and went with him to the Crown Inn where Mr. Borthwick was staying, and took him into Mr. Borthwick's room. Mr. Borthwick was present with several other persons; there was wine on the table, of which the voter partook. Mr. Borthwick asked the voter for his vote, and after some conversation left the room with Mr. Pearne. Mr. Pearne shortly returned and told the voter that Mr. Borthwick wished to speak with him. The voter went into a room where he found Mr. Borthwick alone. Mr. Borthwick then asked the voter for his vote, to which the voter replied, that he could not give it to him, because he understood there was a junction between him and Mr. Rushout, and he had already promised one vote to Lord Marcus Hill. Mr. Borthwick then told the voter, that if he would give him his vote, he would give a sovereign to the voter's son and indemnify him against the arrears of rent due to Mr. Rudge. That the voter did not vote for Mr. Borthwick at the election. The voter further swore that he left the Crown with Mr. Pearne, and that he then mentioned this offer to him, and that he also mentioned it shortly afterwards to a person of the name of Taylor.

Mr. *Rushton* summed up the evidence and contended that a case of personal bribery was established against Mr. Borthwick in both cases. With reference to the first case, he cited *R. v. Pitt* (1) and *R. v. Mead*, (1) and *R. v. Vaughan*, (2) and contended that all allusions to the wish of the voter to have a snuff-box given him were made in jest, and that the expression of his wish never would have been followed up but for the purpose of securing his support which his vote at the last preceding election had rendered doubtful. With reference to the voter Clements, he said the whole question for the Com-

(1) 3 Burr. 1335.

(2) 4 Burr. 2500.

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mittee was, whether there was the slightest reason to disbelieve the testimony of the witness.

Mr. *Thesiger* applied for an adjournment to enable him to obtain the evidence of Mr. Pearne, who had refused to attend, except under the compulsion of a Speaker's warrant, in answer to the alleged bribery of the voter Clements.

Mr. *Rushton* opposed this application, but agreed to postpone the inquiry into the cases of bribery and proceed with the scrutiny which was acceded to, and the scrutiny was then entered on and continued till the arrival of Mr. Pearne.

It appeared from the evidence of Mr. Pearne, that Clements had called on him in July, 1837, and paid him 12*l.* 3*s.* for rent, due to Mr. Rudge, leaving 6*l.* due, that witness had canvassed Clements on behalf of Mr. Borthwick, and taken him to Mr. Borthwick's room at the Crown, where there was wine on the table of which Clements partook, that Clements went into a room with Mr. Borthwick alone, to which room he had been directed by witness at the request of Mr. Borthwick, and that witness left the Crown with Clements, but the witness further stated that he had never at any time mentioned to Mr. Borthwick that Clements was in arrear to Mr. Rudge, nor had Clements ever mentioned to witness that an offer had been made to him by Mr. Borthwick.

Mr. *Thesiger* addressed the Committee on the evidence imputing personal bribery to Mr. Borthwick. He complained of the extraordinary position in which Mr. Borthwick was placed. Originally a petition had been presented against Mr. Rushout as well as Mr. Borthwick, the case was opened against both, suddenly without any apparent reason the case had been abandoned against Mr. Rushout, before any evidence had been gone into. The temporary suspension of the investigation into the

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charge of bribery against Mr. Borthwick, occasioned by the absence of Mr. Pearne, had also led to the discovery of fresh difficulties with which Mr. Borthwick had to contend. At the commencement of the scrutiny which had been gone into, the agent of Mr. Rushout had thought proper to come forward as a willing witness against Mr. Borthwick; this of itself was singular, perhaps, hardly fair, but when by a decision of the Committee, it was discovered that the Committee would not become parties to the compact, which had been entered into between Mr. Rushout and the petitioners, and it became apparent that Mr. Rushout's seat was still in danger; at once Mr. Rushout's agent pauses in his testimony, and declines to proceed further, till he receives an assurance that the scrutiny will be abandoned, rather than Mr. Rushout's seat be endangered. Such proceedings necessarily had the effect of placing Mr. Borthwick in a most disadvantageous position, and entitled him to the utmost indulgence at the hands of the Committee.

With regard to the evidence of personal bribery against Mr. Borthwick, what does it amount to? Some months before the election, nay, before the canvass, before there had been any expectation of an election, a schoolmaster by the name of Pearce, had expressed a wish to have a snuff-box with Mr. Borthwick's crest engraved on it. Mr. Borthwick was willing to gratify that wish, and went to Storr and Mortimer, where he is well known, and selected a snuff-box, which he openly said was intended as a present to an old schoolmaster. He directed that his own motto and crest should be engraved upon it and sent it to the voter. Surely this was not the conduct of a person who was aware that there was anything corrupt or reprehensible in what he was doing. Nothing would have been more easy than to have conducted the transaction with perfect secrecy. Nothing can be more open or un-

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suspicious than the mode in which the present was actually made. It is impossible to conceive that Mr. Borthwick would have acted so openly, and would have ordered his own crest and motto to be engraved on his present, if the idea had ever presented itself to his mind, that the present could be looked on as intended for a bribe.

The case of the voter Clements is altogether of a different character; and no doubt if the Committee should believe the voter Clements, they must hold that Mr. Borthwick's offer to him must be and ought to be fatal to his seat. But before the Committee came to such a conclusion, they will doubtless weigh well the consequences of giving implicit credence to a charge of so grave nature, supported by the unconfirmed testimony of a single witness, and that witness one of a most suspicious description. Clements cannot be contradicted as to what passed between him and Mr. Borthwick; he cannot be indicted for perjury. But there are tests which can be applied to his evidence, and those tests show him to be unworthy of credit. Clements says that before he went into the room, he did not know that Mr. Borthwick knew he was in arrear. Pearne says he never mentioned to Mr. Borthwick that Clements was in arrear; it is not suggested that Mr. Borthwick knew it from any other source, yet the whole conversation attributed by Clements to Mr. Borthwick is founded on Mr. Borthwick's knowledge of those arrears. But not only is the conversation inconsistent with the facts, but it is in itself most improbable. Again, Clements says he told Pearne and Taylor of the offer being made to him: Pearne has been called, and he expressly contradicts this statement; that is sufficient to throw discredit on the witness: if the petitioners wish to set him up again, let them call Taylor to confirm him.

Mr. Cockburn in reply.—In *Pearce's case* the facts are

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admitted, and the only question for the determination of the Committee, is the intention with which the gift was made. The very time at which the present was given is *prima facie* evidence that it was done with an intention to corrupt. At the previous general election, Pearce had voted for Mr. Borthwick; at the election in January, 1837, he had voted for Lord Hill. The gift was intended to produce an indirect influence. Probably Mr. Borthwick did not mean the snuff-box to be a specific bribe, but if it was given with intent to influence the mind of the voter, it is bribery. All the facts stated in evidence by the voter must be taken as admitted, for if any of them were intended to be disputed, Mr. Best should have been called to contradict the voter. It appears from the evidence of the voter, that the box was delivered to him a week before the election; and by the Resolution of the House of the 3rd of April, 1677, a gift made on the eve of an election is bribery. The present question must be tried according to the common law of Parliament, not according to the statute.

The vacancy occurred on the 17th of July, the election was on the 25th, and as the voter says he received the box within a week of the election, which was after the vacancy; there is no necessity of showing the intention, for a gift at such time, *prima facie* is a bribe, and the other side ought to rebut it.

Mr. *Thesiger* here interposed, and contended that as the resolution in question had not been before adverted to, it was not open to the counsel for the petitioner to rely upon it in the reply upon the case.

Mr. *Cockburn*, on the other hand, contended that it was only necessary to open facts, and that resolutions and Acts of Parliament relating to the subject matter under discussion must be considered as open to all parties, and

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proper to be brought forward and relied on at any stage of the case.

The *Committee* did not come to any formal decision upon the objection which had been taken, but after some discussion,

Mr. *Cockburn* proceeded with and concluded his reply, and contended, 1st, That under the resolution of 1677, the gift of the snuff-box was an act of bribery, without reference to intention. 2nd, That if it were necessary for him to show a corrupt intention, the evidence was sufficient for that purpose. He then observed on the evidence of Clements, and contended that so far from that witness having been contradicted in any material particular, he had been confirmed in several important parts of his account. The whole statement of the circumstances which led to his interview with Mr. Borthwick, of his having gone to Mr. Borthwick's private room by the directions of Pearne, and of Pearne having been excluded from that interview, was confirmed. The evidence of Clements bore no marks of fabrication, it presented no appearance of that overwrought clearness and precision which is usually observable in a made up story. It was a simple consistent narrative, for the most part confirmed by the testimony of an adverse witness, of a partizan of Mr. Borthwick. But the answer which has been attempted to be given to it is that he has been contradicted by Pearne, as to the fact of his having communicated to Pearne the offer which Mr. Borthwick had made him, and the petitioners have been challenged to call Taylor to confirm Clements. The petitioners could not call Taylor. If a witness deposes to a conversation, the adverse party may call the person with whom the conversation was stated to have been had, to contradict the witness; but those who produce the witness, cannot call such person to confirm him.

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The alleged contradiction by Pearne, really amounts to nothing. Pearne, a willing witness for Mr. Borthwick, a partizan of Mr. Borthwick, states that he does not recollect such a conversation. Yet Pearne having this all important testimony to give, and being friendly to Mr. Borthwick, actually kept out of the way,—actually refused to attend before the Committee, till he was compelled by a Speaker's warrant. What is the solution of such conduct? It is obvious. He knew full well that he was acting the part of a friend to Mr. Borthwick by keeping away; that he could not contradict Clements in anything material. The testimony which he has given before the Committee proves how correctly he estimated the value of his own evidence; for now that he has been called, he has confirmed Clements in everything that was material, and the sum total of all the assistance which he has been enabled to render to his party and his friend, is comprised in a single *non mi ricordo*, as to a point which is utterly immaterial. But it is said that the story is improbable; it may be granted that it is so, but the most improbable fact in the story is, Mr. Borthwick's having taken Clements aside into his private room to canvass him, and excluded Pearne from the interview; and this fact is confirmed beyond the possibility of being questioned, by the evidence of Pearne himself.

The *Committee* then deliberated on the propriety of allowing to the counsel for the Sitting Member an opportunity of answering that part of Mr. Cockburn's reply which related to the resolution of 1677, and

The *Chairman* stated that as Mr. Cockburn's first proposition had been brought forward for the first time in the course of his reply, the Committee wished to have the following question argued. Whether the resolution of the 3d of April, 1677, having been passed previously to the Bribery Act, had now the force of law?

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Mr. Cockburn then claimed the right to begin the argument, on the ground that the affirmative lay on him.

Resolved.—That as the present argument has been rendered necessary by the omission of all notice of the resolution by the counsel for the petitioners till his reply, the Counsel for the sitting member ought to begin.

Mr. Austin.—In order to treat the question fairly, it may be assumed that the gift was made after the teste of the writ. This will confine the argument to the question proposed, namely, whether the resolution is in force, and is to be treated as law. In order to ascertain to what acts it refers, it is necessary to observe the contemporary history relating to it.

The ordinary mode of bribery in modern times is by the payment of money at so much a head for each vote; formerly the custom was to give a sum of money to the returning officer to make a false return, or to give a gross sum of money to the borough. This money was expended in a system of general debauchery and corruption. An account of these transactions is given by Bishop Burnet in his *History of his own Times*. (1)

It was to provide against sums of money being given to the burgesses generally, that this resolution was passed. Admitting, therefore, the resolution to be law. The gift must be general in its character, and be made in order to procure a corrupt return. The resolution is “that if any person hereafter to be elected into a place for to sit and serve in the House of Commons, for any county, city, town, port, or borough, after the teste, or the issuing out of the writ or writs of election, upon the calling or summoning of any parliaments hereafter; or after any such place becomes vacant hereafter in the time of Parliament, shall by himself, or by any other on his behalf, or at his charge, at any time before the day of his election, give

(1) Vol. III. pp. 178, 286, 369.

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any person or persons having voice in any such election, any meat or drink, exceeding in the true value ten pounds in the whole, in any place or places but in his own dwelling-house or habitation, being the usual place of his abode for six months past : or shall, before such election be made or declared, make any other present, gift or reward, or any promise, obligation, or engagement to do the same, either to any such person or persons in particular, or to any such county, city, town, port, or borough, *in general*, or to or for the use and benefit of them, or any of them ; every such entertainment, present, gift, reward, promise, obligation, or engagement, is by this House declared to be bribery : and such engagement, present, gift, reward, promise, obligation, or engagement, being duly proved, is and shall be a sufficient ground, cause, and matter to make every such election void as to the person so offending, and to render the person so elected incapable to sit in Parliament by such election ; and hereof the Committee of elections and privileges is appointed to take especial notice and care, and to act and determine matters coming before them accordingly."

The gifts referred to do not relate to a single case of endeavouring to procure a particular vote. The mischief described in contemporary history, was the corruption of a " county, city, port, or borough, *in general*."

This, the resolution forbids, and declares the acts creating it to be bribery. The offence was defined as applicable to the evil prevalent, namely, the giving of rewards to large bodies of persons to obtain a corrupt return. Admitting, therefore, the resolution to be law, it applies to gifts that are general in their character. This is further shewn by the special words of the resolution. The first part of it prohibits the gift after the teste of the writs of election, of meat or drink exceeding in the true value 10*l*." The giving of meat or drink to one or two persons, to the

1838. amount of 6*l.* or 8*l.* is not forbidden. The soliciting of particular votes by these means was not the evil sought to be checked. It was general corruption that the House intended to prevent. The second part of the resolution is to be taken in connection with the first. It forbids the making of any gift before the election, "to do the same," that is, "generally to corrupt," either "to any such person or persons in particular, or to any such county, city, town, port, or borough, *in general*." A gift to one for the benefit of a number, or a gift to a borough for the benefit of the place in general, is made an offence, if for the purpose of effecting the return, by being given upon the eve of an election. A gift to procure a single voice is not within the prohibition.

After this resolution followed in 1696 the 7 Wm. III. c. 4, which recites, that "grievous complaints are made and manifestly appear to be true, in the kingdom, of undue elections of Members to Parliament, by excessive and exorbitant expenses, contrary to the laws and in violation of the freedom due to the election of representatives for the Commons of England in Parliament." These complaints applied to excessive and exorbitant expenses. The same general evil to which the resolution of the House referred. It was then enacted, that no person after the teste of the writ of summons to Parliament, or after the teste, issue or ordering of the writ of election, should directly, or indirectly give, present, or allow, to any person or persons, having voice or vote in such election, any money, meat, drink, entertainment, or provision, or make any present, gift, reward, or entertainment, or should at any time thereafter, make any promise, agreement, obligation, or engagement to give or allow any money, meat, &c., to or for any such person, or persons in particular, or to any such county, city, town, borough, port or place in general," in order to be elected and the person so acting shall be incapacitated to serve upon such election.

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By this statute the resolution of the House was turned into an act of the legislature and the resolution superseded. The evil attempted to be checked by the resolution, had no doubt extended, and it had become necessary to enforce the resolution by a special law.

It may be difficult to state in that manner resolutions of the House are abrogated without a formal vote, but it must be assumed, that if a statute passes, couched in nearly the same language, and nearly in the same terms as a resolution, the resolution is thereby superseded. It cannot reasonably be presumed to be intended that they should co-exist. But this is not the only act providing for the cases mentioned in the resolution. The stat. 2 G. II. c. 24, 37, imposes penalties in cases of bribery, and the 49 G. III. c. 118, inflicts a heavy penalty upon a person giving a bribe, if not returned; and incapacitates him from serving in that Parliament, if he is returned.

Both these acts plainly set aside the resolution. In the former there is a clause directing, that all returning officers shall read it openly before the electors. This reflects much light upon the subject, as it shows that it was directed against the same general corruption as the resolution, and was therefore intended to supersede it.

But what is the effect of a resolution of the House of Commons? The House alone can make no new law. All that it can do is to declare what the law of Parliament is, and this it must collect from custom or usage. No resolution can add to the law; all that it can do is to declare that such and such acts are forbidden, and that such and such expenses are punishable by the law of Parliament. But when an act of Parliament follows and embodies a resolution of the House, the consequence is that it supercedes the law of Parliament.

Sir R. Peel.—Was there any statute against bribery at the time of the *Westbury case*, when Thomas Long was

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expelled? Or at the time of the *Bewdley case*, when Mr. Foley's election was declared void?

Mr. *Austin*.—None. The House has always had the power of expelling its members, and all that these cases amount to is, that the House took notice of what passed at an election, and removed those members, not because they were entitled to expel on the ground of bribery as a legal offence, but because they might remove any member who committed an act proving him to be unworthy to sit. The effect of the statutes and of the resolution, when it was in force, may be the same as regards the seat, but the resolution having been made the foundation of a statute was thereby virtually repealed.

Mr. *Cockburn*.—The consequence of an act of bribery, as it affected the seat, did not depend upon any statute in the cases of Long and Foley, but upon the common law. That common law was declared in the resolution of 1677, and is still in force. In the *Westbury case*, (1) Thomas Long was expelled for giving four pounds to the returning officer, and the matter "was examined and adjudged in the House of Commons," says Lord Coke, "*secundum legem et consuetudinem parliamenti*, and the mayor fined and imprisoned, for this corrupt dealing was to poison the very foundation of justice." The *Bewdley case* was decided in 1676. Both cases arose under the common law. They neither depended upon any resolution of the House, nor upon any statute. It did not require a resolution of the House to make the offence of bribery noticeable. "Bribery at the elections of Members of Parliament must always have been an offence at common law and punishable by indictment or information." *Rex v. Pitt*, (2) The decisions of the House before the resolution passed, proceeded upon the ground, that a criminal offence punishable at law had been committed.

(1) 4 Institute, 23.

(2) 3 Burr. 1320

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If prior to the resolution there had been no pre-existing law against bribery, the resolution would have been a nullity, but the resolution was referred to, to show what the common law relating to bribery, and the consequences of bribery, were before it was made. (1) The statute law has not annulled the common law upon this subject. In some particulars it has provided for the enforcement of new penalties, but in the particulars that it has left untouched, the common law continues to prevail. The resolution merely expresses what the common law is, and the statutes are cumulative upon it. The 7 W. III., contains nothing inconsistent with the resolution, and the utmost extent to which implied abrogation of a resolution can be carried is its inconsistency with subsequent acts of the House. The 2 G. II. c. 24, has no reference to candidates. It may have been intended by the enactment disqualifying an offender from ever again voting in any election for Members of Parliament, to operate upon the minds of voters, but it contains nothing that can afford the slightest ground to argue, that it invalidates the resolution, or that the House intended it to have any such effect. The 49 G. III. c. 118, increases the penalties incurred by the offence of bribery, but it also contains nothing inconsistent with the resolution. The legislation upon this subject, does not show that the law has been relaxed. Supposing that the entire resolution had been contained in the statute of W. III., would it be open to say, that because subsequent statutes have been passed on the same subject, the clause enacting the resolution would be thereby repealed? The omission to insert the whole of the previous law relating to an offence, in a new law relating to it, does not of itself imply that the old law is repealed. The resolution expounds the common law upon the subject, and is not inconsistent with subsequent statutes. But then it is con-

(1) 3 Burr. 1338.

1838.

tended, that it is applicable to general acts of bribery, and not to particular cases. The words of it are clear and precise. The second part states nothing respecting the value of the gift. It is sufficient if it is made to any person or persons, and where is the authority to say, that the term person applies to many and not to one individual? If the evidence proves that a gift has been made to a person having a voice in the election. The crime charged is proved, and the resolution applies.

Mr. *Austin* replied.

Resolved.—That the Committee must look to the statute law and not to the resolution of the House of Commons of 1677 for the definition of the offence of bribery.

The Committee further resolved, that bribery has not been proved in the case of Clements.

That it has been proved in the case of the gift of a snuff-box to Ebenezer Pearce.

Mr. *Austin* stated that it was a matter of great importance to his client to know on what grounds the Committee had come to their last resolution, and he therefore wished to make an application to them, to specify the particular statute on which their decision had been founded.

Mr. *Cockburn* opposed the application, and the Chairman intimated that it would not be a convenient course to accede to an application, which, in effect, called on the Committee to specify the grounds of their decision.

The *Committee*, however, re-considered the form of their resolution, and the Chairman then stated that the Committee were desirous not to prejudice Mr. Borthwick, by the wording of the resolution, nor to specify the grounds of their decision, and they thought it better merely to say that in the case of Ebenezer Pearce, bribery has been proved.

Mr. *Austin* then withdrew his application.

In the course of the investigation of the charge against Mr. Borthwick, for giving a snuff-box to Ebenezer Pearce,

the following decisions were come to on points of evidence which were not inserted in the order in which they occurred, as they would have interfered with the narration of the case.

1838.

The witness stated, that after the election he had a conversation with Mr. Best about the box, he was asked what Mr. Best then said to him.

Mr. *Thesiger* objected to any conversation of Mr. Best, after the election, unless Mr. Borthwick was shewn to have been present.

How far principal is bound by statement of an agent.

Mr. *Cockburn*.—The promise of this snuff-box, by Mr. Borthwick, the sending of it to Evesham, and the delivery through Best have been proved, which is sufficient to shew that Best was an agent for the particular purpose of delivering the box. An observation has been made from the chair, that if Mr. Borthwick had entrusted the box to a carrier to be delivered to Pearce, Mr. Borthwick could not be affected by the conversation of the carrier. Such a position cannot be disputed for a moment, but there is no analogy between that case and the present. What a carrier does, is done in pursuance of his general capacity of carriers, but there was a special consignment of the box in question by the directions of Mr. Borthwick to Mr. Best, an attorney, for the purpose of its being delivered by him to the voter.

Mr. *Thesiger* in reply. It may be freely conceded, that Mr. Best had been constituted the particular agent for the delivery of the box in question. But the evidence which is offered is not receivable on the ground, that it is a conversation by Mr. Best in the absence of Mr. Borthwick, and at a time when the commission of Mr. Best had expired. When a particular agent appointed for a specified purpose, has accomplished that purpose, his powers cease, and his subsequent conversations, even on the subject of his commission, cannot affect his principal.

Resolved.—That counsel be directed to argue the ques-

1838.

tion, whether the appointment of Mr. Best as specific agent for the delivery of the box, coupled with the extent and nature of his connexion with the election, does not render the evidence admissible, although he has not been proved to be a general agent.

During the discussion of this question, the witness Pearce was re-called, and stated that Mr. Best gave him the box with Mr. Borthwick's compliments, and told him to put it aside till after the election; the following are the arguments which were made on the proposed question:—

Mr. *Thesiger*.—The general rule, as to the admission of agents is, that if a person is proved to be the agent of a principal, whatever he does or says in the making of a contract is evidence and binds the principal, but it is not admissible as the agent's account of what passed at the time. *Langhorn v. Allnutt*. (1) Declarations of an agent for a particular purpose bind the principal for that particular purpose, but these declarations must be contemporaneous with the act, or made while it is in the course of being performed. But any declaration made by the agent, after the act for which the authority was given has been completed, is presumed to have been made without the authority of the principal. (2) *Helyar v. Hawke*, (3) *Kahl v. Jansen*, (4) *Fairlie v. Hastings*. (5)

Mr. *Cockburn*.—The conversation which has been tendered in evidence came within the scope of Mr. Best's authority. Here the object was to corrupt the voter by the delivery of the box, and whenever a guilty purpose is disclosed, evidence ought to be admitted of every thing which the agent does or says in furtherance of that purpose. In this case, the message given to Pearce at the time of the delivery of the box, shews that Mr. Best had been employed not merely to deliver the box, but to cause the delivery to be concealed. None of the cases

(1) 4 Taunt. 519.

(2) *Phillips on Evidence*, p. 100—1.

(3) 5 Esp. 72.

(4) 4 Taunt. 565.

(5) 10 Ves. 128.

cited establish the position, that words spoken by an agent, in furtherance of a general design, are inadmissible on the ground of their having been spoken subsequently to the accomplishment of the main object for which the agent was appointed.

1838.

Mr. *Thesiger* in reply. The agency to cause concealment was limited to the time of the election; the conversation now sought to be given in evidence was a fortnight after the election.

Resolved.—That the evidence is not at present admissible.

Witnesses were then called to prove that Mr. Best was a general agent for Mr. Borthwick, for the purposes of the election. In the course of the cross-examination of these witnesses, Mr. *Thesiger* put questions respecting the mode in which the petition had been got up, but the Committee requested that any investigation of which the object was to shew that the petition was frivolous and vexatious, should be brought forward distinctly, and not mixed up with the inquiry into the charges made by the petitioners. In the course of the examination into the nature of Mr. Best's agency, Mr. Borthwick's solicitor, who was engaged for him in the defence of the seat, was examined for the purpose of proving facts, which had come to his knowledge as solicitor of Mr. Borthwick.

Mr. *Thesiger* objected and referred to the *Norwich case*. (1)

The Committee intimated that the witness was not to be asked to make any disclosure of a confidential nature, whether it related to communications which had been made to him by his client, or facts with which he had become acquainted in his character of solicitor.

After the evidence respecting Mr. Best's agency was completed the question as to what Mr. Best said about the

(1) 3 Luters, 451. *Phillipps on Evidence*, p. 100—1.

1838. snuff-box was again put to the witness and again objected to, and it was

Resolved.—That general agency has not been proved, and the question cannot be put.

JOSEPH JUSTIN'S CASE.

The vote of a person employed as a messenger during an election held bad.

Voted for Mr. Rushout and Mr. Borthwick, objected to under 7 & 8 G. IV. c. 37, s. 1, for having been employed as a messenger during the election.

It was proved that Justin was employed, for about a fortnight previous to the election, as a messenger to Mr. Rushout's committee. For which he was paid 5*l.* by the agent of Mr. Rushout.

Mr. *Thesiger* in cross-examination asked the witness if William Powell had been employed as a messenger.

Mr. *Cockburn* objected to the question on the ground that Powell was objected to on behalf of the Sitting Member, and the inquiry ought to be confined to the vote under consideration.

Resolved.—That although the Committee did not consider themselves bound to lay down a strict rule on the point, yet it was their wish that the cross-examination should be confined to the vote under discussion.

After the evidence was closed.

Mr. *Cockburn*, against the vote, argued that the case was within the words of 7 & 8 G. IV. c. 37, s. 1, as the voter had certainly been employed in the "capacity of messenger for the purposes of the election." He was clearly within the mischief contemplated by the act, inasmuch as it was the object of the legislature to insure the perfectly free and independent exercise of the franchise, and to prevent the use of any undue influence, by means of the employment of voters at the time of the election. It was obvious that the employment of a party, as messenger,

would be open to all the consequences which was thus intended to prevent. In support of this view he referred to *Secker's case*, *New Windsor*, (1) and *Beard's case*, *Ipswich*. (2)

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Mr. *Thesiger* contended first, that a messenger was not within the words of the act, inasmuch as a messenger was not specially named, and the general words must be taken to refer only to cases *ejusdem generis*. Secondly, That a messenger did not come within the meaning of the act, and that there was no more reason for disqualifying a messenger than a postboy or coachman engaged in taking electors to the poll.

The *Chairman* suggested that the broad distinction between a messenger and those classes of persons to whom allusion had been made was, that the messenger was specially employed for the purpose of the election, whereas the other classes of persons were merely employed in their usual avocations.

Vote held bad.

Mr. *Thesiger* requested that the name of the voter might be struck off the poll of Mr. Rushout as well as that of Mr. Borthwick.

Mr. *Cockburn* objected to this course, on the ground that Mr. Rushout was placed in precisely the same position by the course which had been adopted as if originally no petition had been presented against him.

Resolved.—That as the petition had been presented against Mr. Rushout as well as Mr. Borthwick, and as the voter whose vote had been disallowed had voted for both, his name must be struck off the poll of both.

GEORGE BRIMGARD'S CASE.

Voted for Mr. Rushout and Mr. Borthwick, objected to on the same ground.

Bad votes
struck off the
poll of a Sitting

(1) K. & O. 185.

(2) *Supra*, 293.

1838.

Member
against whom
the petition had
been abandoned.

The witness against the vote was Mr. Rushout's agent, and in the course of his examination, he appealed to the Committee to say, whether he was bound to answer questions which might affect the seat of Mr. Rushout for whom he was agent.

Mr. *Cockburn* stated, that Mr. Rushout was not before the Committee, and that it having been understood when the case against Mr. Rushout was withdrawn, that the proceedings were not to affect his seat in any way, rather than do any thing which might seem to violate that arrangement, he would consent to resign all hopes of the seat on behalf of Lord Hill, and if the result should place Mr. Rushout's seat in jeopardy, he would at once abandon the scrutiny.

Mr. *Theisger* observed, that the charges against the Sitting Members were joint, that they were both implicated in the charges of bribery, and that if by some private arrangement between the petitioners and Mr. Rushout, it should be agreed that those two parties should coalesce, that Mr. Rushout should advance the interest of the petitioners, and that Mr. Borthwick should be sacrificed, it would be productive of the greatest injustice to Mr. Borthwick.

The *Chairman* informed Mr. Cockburn, that the Committee were willing to hear him argue against the decision which they had come to in *Justin's case*, to strike the name off the poll of both the Sitting Members, but that their present opinion was that they were bound to persevere in that decision.

Mr. *Cockburn* fully acquiesced in the justice of that decision, and was willing that names should be struck off from the poll of both the Sitting Members.

Mr. Rushout's agent was then re-called, and having established the fact, that he as agent for Mr. Rushout had paid the voter 5*l.* for acting as messenger on behalf

f Mr. Rushout at the election, the vote was held bad and struck off the poll of both the Sitting Members.

1838.

THOMAS GEORGE'S CASE.

Voted for Mr. Rushout and Mr. Borthwick, same round of objection as the last.

Vote of messenger held bad although it was his ordinary calling.

It appeared on the cross-examination, that the voter as in the habit of being employed as a messenger as his ordinary business.

Mr. *Thesiger* wished the Committee to consider whether the circumstance of the voter's having been employed in his ordinary calling did not distinguish this voter's case from that of Justin.

Vote held bad.

JOHN PAINE'S CASE.

Voted for Mr. Rushout and Mr. Borthwick, objected to for having been employed as a carrier during the election.

Vote of a carrier who was hired, but employed a deputy, held bad.

It was proved that the voter had been nominally appointed a carrier on behalf of Mr. Rushout, with a salary of 1*l.*, that he was not required to act as a carrier, but merely to procure a person to act for him, which person was to be paid by the voter, the usual remuneration for such service being five shillings. The voter accepted the appointment and was paid 1*l.* It appeared that a considerable number of persons had been so appointed, amounting to not less than 100 out of a constituency of 400.

Mr. *Cockburn* against the vote, relied on his former argument in *Justin's case*, and further pointed out the number of persons employed in this capacity, obviously for the purpose of putting into their pockets the differ-

1838. ence between the amount paid to them and the sum paid by them to the parties really officiating.

Mr. *Thesiger* contended, that this was not an employment. The argument attempted to be deduced from the alleged number of similar cases ought not to weigh for a moment with the Committee. He had objected at the commencement of the inquiry into Paine's vote to a question as to the custom of paying carriers at the election, it had been conceded that the question was irregular and it had been waived, yet the information intended to be elicited by that question had subsequently been obtained from the witness, principally in answer to questions put by the Committee, and an argument was now attempted to be raised upon it against the vote, on grounds which were quite foreign to the question on which the Committee were called upon to decide. The simple point for them to determine was, whether this was an employment. It might possibly be bribery, in which case, being paid by Mr. Rushout's agent, it would vacate his seat. But how could it be said that the voter was employed as a carrier. If he was employed at all it was to procure a carrier, that can hardly be called an employment in any capacity for the purposes of the election, or even if it could be so considered it could not be taken advantage of under the present head of objection.

The *Chairman* informed the parties that the Committee assumed it to have been proved that the voter had been placed on the carrier's list, that the Committee considered that the occupation of a carrier fell within the words of the act "or in any other capacity for the purpose of such election," that a carrier must be considered in the same light as a flagman, and that it would be a palpable evasion of the spirit and intention of the act that a voter should be appointed as flagman and be transmitted to transfer his duties to a deputy to evade the law, and that the

same principle appeared to apply to persons nominated and appointed carriers but not actually performing the duty.

1838.

Vote held bad.

SAMUEL BROTHERTON'S CASE.

Voted for Mr. Rushout and Mr. Borthwick, objected to on the ground that between the registration and the time of the election, he had ceased to occupy the premises in respect of which his name was entered on the register.

Proof that the three questions were put at the poll required.

The voter occupied a house and land at the time of registration. The house being worth 6*l.*, the land about 13*l.*; he had quitted the land at Michaelmas, 1836, and the house in April, 1837, and the house before and at the time of the election was in the possession of the landlord.

Mr. *Banks* objected that it had not been proved that the three questions required by the Reform Act, sec. 58, had been put at the poll.

Mr. *Cockburn*, without arguing the question, gave evidence that the three questions had been put.

Vote held bad.

Mr. *Cockburn* then stated that the petitioner was in a majority, and as the Sitting Member, Mr. Borthwick was disqualified, he claimed the seat for the petitioner.

Sitting Member allowed to carry on scrutiny after he has been disqualified and placed in minority.

Mr. *Banks* contended that the electors were interested in defending the seat, even after the Sitting Member was shewn to be disqualified, that the electors were virtually parties to the petition, and that it was on this principle that the admission of voters were received in evidence against the Sitting Member.

Mr. *Cockburn* in reply, Lord Marcus Hill is at present in a majority, and there are now no parties before the Committee in a situation to oppose his return. By the decision of the Committee, Mr. Borthwick is disqualified

1838.

from sitting; *Rogers on Elections*, p. 71, and he would be ineligible as a candidate if the return were to be declared void. Mr. Borthwick has no further interest in the decisions of the Committee, nor is he competent to contest the seat after having been found guilty of bribery. There is no case, with the exception of the *Oxford*, (1) in which bribery and scrutiny have been mixed. In that case, Mr. *Walsh* took the present objection, but no decision was come to on the point, for Mr. *Follett*, with great adroitness, instead of answering the objection of Mr. *Walsh*, started a prior objection to the right of the petitioner to proceed with a scrutiny after a resolution of a Committee disqualifying the Sitting Member, and the Committee in deliberating on this latter question overlooked the original objection, and decided that the petitioner should proceed with his case, leaving Mr. *Walsh's* objection unconsidered. There is no express decision on the present point, but the case of a Sitting Member, after having appeared before a Committee in defence of his seat, withdrawing from further contest is analogous. If a Sitting Member abandons his seat, and no electors have been admitted on petition to defend the return, the Committee cannot proceed with the case, this has been decided in the *Waterford case*, (2) where the authorities on the point are collected in a note. The petition is the record of the matters which the Committee have to try, and of the parties between whom they are to be tried, the parties on the present record, are Mr. Rushout and Mr. Borthwick on the one side, and Lord Marcus Hill on the other, all questions between Lord Marcus Hill and Mr. Rushout were disposed of when Mr. Rushout withdrew from the Committee, the decision of the Committee which has

(1) C. & R. 138. P. & K. 69.

(2) 1 Peckwell, 239. Where the authorities on the point are collected in a note.

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disqualified Mr. Borthwick from sitting in the House, has also disqualified him from protracting the present contest. The electors are not before the Committee, they are not parties to the inquiry, and the Committee cannot proceed at their instance. As an opportunity is given by statute to electors to come in and defend the seat, and as in the present instance, the electors have omitted to avail themselves of this right, they must be taken to have no sufficient interest to induce them to incur the expense of defending the seat, and must be considered as concluded by the incapacitation of the Sitting Member, who has clearly no longer any interest in the result, or any *locus standi* before the Committee. If a Sitting Member be placed in a minority on the scrutiny, he may abandon the scrutiny and proceed with a case of bribery against the petitioner, for the purpose of disqualifying him, but after a Sitting Member is himself disqualified, his seat is gone and he can proceed no further with the case.

The *Chairman* observed, that Mr. Gibson had attended the House and voted after the Belfast Committee had declared him disqualified.

Mr. *Cockburn* contended, that such an instance was not in point, for the House had no cognizance of the decision of the Committee till the report was made; but he suggested that the member who so voted had been guilty of an illegal act, and that if the question had been put to the Speaker in the first instance, he would not have allowed the vote of the member to have been taken.

Resolved.—That the Committee being bound by law to try and determine the merits of this election petition, are bound to receive any evidence which may be tendered, either for the purpose of establishing the majority of legal votes given to any of the candidates, or to affect the return of other parties.

1838.

RICHARD BECKINGSALE'S CASE.

Proof that the three questions were put at the poll required.

Mr. *Cockburn* objected to this vote being gone into on the ground that it did not appear on the poll-book, that the three questions required by sec. 58 of the Reform Act, had been put to the voter at the poll.

The *Chairman* intimated that it would be better to prove that the question had been put without arguing the question, as the same objection had already been acted on in the case of a voter proposed to be struck off by the petitioners. At the same time he stated, and apparently with the full concurrence of the Committee, that the questions ought to be put at the poll as a preliminary step to a scrutiny by a Committee, as such a course is calculated to promote inquiry on the spot and thus prevent bad votes from being placed on the poll, and save the necessity of expensive litigation. (1)

Mr. *Cockburn* in the course of this case, objected to the examination of a clerk to the agent of the Sitting Member, on the ground that he had been in the committee-room whilst the proceedings had been going on.

The *Committee*, after argument, admitted the evidence, on the ground that the facts which he was called on to prove, were of such a nature that his testimony was not likely to be affected by his having been in the room.

The clerk was then called and proved that he had been present at the poll, and was asked if he had heard the three questions put to the voters at the poll.

Mr. *Cockburn* objected to this mode of proving that the questions were put; on the ground that the only proper proof would be the entry on the poll-book by the returning officer or his deputy.

Resolved.—That as it was not the duty of the returning officer to record the fact of the questions having been put,

(1) *Infra*, p. 548.

that fact might be proved in any manner, and that the examination might be proceeded with ; but as the witness was unable to recall, with certainty, to his recollection, the circumstances which occurred at the time of the voter's polling.

1838.

Mr. *Banks* applied for an adjournment to enable him to call the returning officer as a witness, this application was refused, and as the putting of the three questions at the poll had not been proved, the objection in the heading of the list was not gone into, and the vote was held good.

THOMAS MILTON'S CASE.

Registered as a 10*l.* householder, voted for Lord Marcus Hill, objected to for change of residence. The voter's name appeared in the rate for July, 1836, " Thomas Milton, coal-wharf, &c., Bridge-street, 40*l.*" and " Thomas Milton, dwelling-house, Bridge Street, 10*l.* In the rates for March and July 1837, he was rated for the house, but not for the coal-wharf, at these times Messrs. Judd and Chandler, were rated for and in possession of the coal-wharf, and paid their rates in respect of it. In May 1837, Collins was in possession of the house, for which the voter had been registered in 1836. At the time of the election it was in the occupation of Hall. The voter was rated for the house and wharf in July 1836, and so in the succeeding rates up to February 1837. In the February rate 1837, he was rated for the house but not for the coal-wharf. In the May rate 1837, he was not rated either for the house or wharf. A witness was called who proved that Milton retained a room in the house, in his own occupation, and a small portion of the wharf, worth together 6*l.* a-year. A witness was called in support of the vote, who swore that the part retained by the voter, was worth 10*l.* a-year to the voter for the purposes of his business. The only question made

When voter has lost part of his qualification Committee will not strike him off without inquiring into value of residue.

1838.

was whether the part retained by the voter had been proved to be of the annual value of 10*l*.

Vote disallowed.

Petitioners allowed to enter on a new class of objections and afterwards return to former class.

Mr. *Cockburn* then proposed to strike off the vote of George Brotherton for change of residence after registration, but being unable to proceed with the case in consequence of the absence of a material witness, he proposed to take the class of bell-ringers, and to return to the case of Brotherton, when his witness should arrive.

Mr. *Banks* objected to the petitioner being allowed to return to a class after having once left it, and referred to *Rogers*, pp. 74, 5. "According to the present practice, Committee's compel parties to continue a class of objections when they have begun upon it."

Resolved.—That considering the Committee have not previously laid down any rule binding the course which counsel should take in this particular instance, and considering there are some peculiarities in this case, upon the whole of their imperfect knowledge of the subject, they are unwilling to interfere with the receiving of evidence which is thought material, but decide for the future to go on with one class.

HENRY HERITAGE'S CASE.

Votes of ringers held good.

The voter himself was called and proved that he and other persons who were the regular ringers, had rung for the canvass and election. They were employed for twelve days in ringing for the canvass and for nine days in ringing for the election; 20*l*. was paid for the ringing at the canvass by Messrs. Rushout and Borthwick, and the same sum for the ringing at the election.

The money for ringing at the canvass was divided amongst five, that for ringing at the election, amongst six.

Mr. *Cockburn* contended that this voter was disqualified under the Act of Parliament.

1838.

Mr. *Banks* argued in support of the vote.

Resolved.—That although the Committee consider the employment of ringers for the purpose of the election might be perverted into a great abuse, yet as in this case it is not alleged that the payment was so large as to constitute in itself an act of bribery and corruption; and as the only ground on which it is sought to disqualify this voter, is founded upon the Act of Parliament which makes all persons employed and paid for the purposes of the election, liable to lose their votes for that election, the Committee think themselves justified in taking into consideration the circumstance that ringing was the ordinary occupation of these men, and the prevalence of the practice, and are not prepared to disqualify the voter.

A few other cases of trifling importance were decided, and the scrutiny was closed, leaving Lord Marcus Hill in a majority of one over Mr. Borthwick.

Mr. *Austin* stated, that it was not his intention to protract the scrutiny any further, but he wished to call the attention of the Committee to a question of serious importance to his client. There had been two cases brought before the Committee for the purpose of establishing a charge of personal bribery against Mr. Borthwick. One of these cases related to the gift of a snuff-box: the other to a promise alleged to have been held out to a voter of the name of Clements. The latter case would have been important if unanswered, and it was therefore answered; the former was treated by Mr. Borthwick himself, and by those to whom the conduct of his case was intrusted as one of no importance, and it was thought that after the manner in which the law had been expounded in the opening, it would not be treated by the Committee otherwise than as a trifling proceeding. What took place

1838. when the point of law connected with that case was argued, confirmed this opinion. But the decision that had been made had been both painful to Mr. Borthwick and to his counsel, and entirely unexpected. He therefore now applied to the Committee to allow him to furnish evidence to destroy the presumption that the snuff-box had been given with an intention to bribe.

When counsel were asked to argue the legal question, it was thought that the legal question alone would have been decided upon; and the decision made upon that question appeared to render it unnecessary to give further evidence upon the facts. But, as it now turned out that this evidence was material, the earliest opportunity was taken to apply to the Committee to hear evidence of all the facts of the case, and it was to be hoped that the application would be regarded as just and reasonable.

Mr. Cockburn.—The adjournment of the Committee was consented to yesterday, upon the understanding that the scrutiny would be abandoned.

As the scrutiny had been abandoned, and Lord Marcus Hill is now in a majority, he had no interest in opposing the application. There was no wish to affect Mr. Borthwick with the penal consequences of any act that he might have committed, or to prevent his giving evidence to remove any incapacity to which the resolution of the Committee, if unreversed, might expose him.

The Chairman.—From the course pursued at the time by the counsel upon both sides, the Committee had reason to believe that all the evidence relating to the case had been given. Without the arguments upon the resolution of 1677, the Committee were in a position to have decided upon the evidence. But that resolution having been referred to in the reply upon the evidence, counsel were asked to argue the question of its effect. The Committee then passed their resolution, which was not founded on

the resolution of 1677; and they now consider that the question on which they made their resolution was ripe for their decision, and there are no sufficient grounds for entering into a fresh inquiry.

1838.

A Member of the Committee.—The evidence purposed to be given would be *ex parte*; will the counsel for the petitioners attempt to answer it?

Mr. Cockburn.—The petitioners have no wish to prevent the evidence being heard.

Resolved.—That no sufficient grounds have been shewn to justify the Committee in granting a re-hearing.

The usual resolutions were then passed, declaring Lord Marcus Hill duly elected.

CASE XVIII.

STIRLINGSHIRE.

The Committee was chosen on the 26th of April, 1838,
and consisted of the following members :—

H. G. Ward, Esq. (Chairman), <i>Sheffield.</i>	
Hon. H. R. Westensra, <i>Monaghan, Co.</i>	J. Rundle, Esq. <i>Tavistock.</i>
Lieut.-Gen. M. Sharp, <i>Dumfries.</i>	Major W. F. Chetwynd, <i>Stafford.</i>
Col. H. D. Baillie, <i>Honiton.</i>	A. Chapman, Esq. <i>Whitby.</i>
G. Wilbrabam, Esq. <i>Cheshire, S.</i>	M. Phillips, Esq. <i>Manchester.</i>
W. Pinney, Esq. <i>Lyme Regis.</i>	J. A. Yates, Esq. <i>Carlton, Co.</i>

Petitioner—

Lieutenant-Col. the Honourable G. R. Abercromby.

Counsel for the Petitioner—

Mr. Serjt. Merewether, Q. S., Mr. B. Andrews, Q. C.

Agents—Richardson and Connell.

Sitting Member—W. Forbes, Esq.

Counsel for Sitting Member—

Mr. Theiger, Q. C., Mr. Austin, and Mr. B. S. Follett.

Agents—Spottiswoode and Robertson.

The lists of objections on the part of the Sitting Member contained 123 names, those on the part of the petitioner 350 names.

The following are the principal headings of the lists of the petitioners.

1. That there is only one Peter Wilson on the register, that Peter Wilson voted twice, and both of his votes were

reckoned in the summing up of the poll-books, or that the said Peter Wilson was personated.

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2. That William Bow intended to vote, and did vote for the petitioner, but was marked and entered as voting, and his vote reckoned for the Sitting Member, whereas he ought to have been marked and entered as voting, and his vote reckoned for the petitioner.

3. Parted with, conveyed away, and disposed of whole of property, or part of it, after registration.

4. That he did not claim to be registered, or made a bad or insufficient claim, and is not described in his claim or in the register.

5. That his claim to be registered does not specifically and sufficiently describe any property; that he was not duly registered, that his property is not sufficiently described in register or claim. That the claim and certificate by the schoolmaster thereon bears, or one or other of them bears an erroneous or false date.

6. That the claim, in respect of which, he was registered and voted, is made in the name of another, and not in his own name: That he had renounced his right in the property or part thereof, in respect of which he was registered and voted.

7. That he had no legal qualification, entitling him to be registered or to vote. That subsequent to his registration and before the said election, he had ceased to be in the possession or actual personal occupancy of the property, or some part of it, in respect of which, he claimed, and was registered and voted. That at the time of the said election, he was not in the possession or actual personal occupancy of property, qualifying him to be registered or to vote.

8. That his name is not on the register under the number given in at the poll, or entered upon the poll.

9. That the claim and annexed schoolmaster's certificate

1838. on which he was registered and voted, are informal and null.

10. That he did not claim to be registered, or made a bad or insufficient claim, is not described in his claim or in the register.

11. Before election, ceased to occupy property, for which he was registered and voted; before election ceased to have same interest as he possessed at registration. Subsequent to registration, and before election, other persons became jointly interested therein.

12. That the rent of the property, in respect of which he claimed, and was registered and voted, was not of sufficient amount to entitle him to be registered and to vote.

13. Claim on which he registered and voted, informal and null, and date of certificate of schoolmaster, thereon is rased and vitiated, and improbative.

14. Now expunged from the register.

15. No legal qualification entitling him to be registered or vote; claim made in respect of property, which does not in law, yield a qualification, and the qualification and vote are nominal, fictitious, and occasional, and the deed, constituting the right on which the claim is made, was not stamped according to law.

16. No legal qualification entitling him to be registered or vote. Claim made in respect of property, which does not, by law, yield a qualification, and which still remains in the possession of the pretended disponent. That the pretended price of the life-rent right has never been paid, and the qualification and vote, are nominal, fictitious, and occasional.

17. That the property, in respect of which, he registered, or part thereof, is locally situated within the limits of another county, and forms part thereof, under the provisions of the act, 2 & 3 Wm. 4, c. 65.

18. Disqualified by having received a bribe, or promise

of a reward, or valuable consideration, for his vote, and having voted in consequence of such illegal consideration. 1838.

19. Claim not dated, or erroneously dated, and that the schoolmaster's certificate thereon is not dated, or is erroneously dated.

20. That he had been divested of the property in respect of which he claimed to be, and was registered and voted prior to the said election, under a disposition *omnium bonorum* in a process of *cessio*.

Mr. Serjt. *Merewether* opened the case as one of scrutiny, and said that if the scrutiny were fully gone into, it would disclose a complete system for the manufacture of fictitious votes, some of them under the pretence of rent-charges for life, others as joint-tenants, and numerous cases would appear, in which the owner of property had nominally taken in all his brothers, or sons, as joint-tenants with him, without even allowing them any portion of the proceeds. Some cases would appear in which ground-rents annual, had nominally been granted, and, yet the grants were of such a nature, that if the grantor had sold the land the day after making the grant, the purchasers would hold the land discharged from such grant. He stated that the majority of the Sitting Member consisted only of one.

PETER WILSON'S CASE.

Voted for Mr. Forbes. Objected to for having voted twice.

It was proved that there was only one Peter Wilson on the Register, who was entered No. 57 on the Register, and registered for property in the parish of Larbert. The following entry occurred twice in the poll-book of the Falkirk district, in which Larbert was situate :—

In the absence of any direct evidence of a mistake, the entry on the poll will be presumed to be correct.

1838.	" Name of Voter.	No. on Register.	Parish.	Initials of Candidate."
-----	" Peter Wilson.	57.	Larbert.	W. F."

both these entries were reckoned in favour of Mr. Forbes in summing up the poll.

Mr. *Austin* said that although there was only one Peter Wilson on the Register, yet there was a James Wilson, and he cited *London's case, Taunton*, (1) to show that a vote may be perfectly good, although entered on the poll by a wrong name.

Chairman.—Unless it be shewn that James Wilson voted and was entered as Peter, one of the entries must be struck out.

Vote struck off.

WILLIAM BOW'S CASE.

A voter allowed to correct himself at any time before the recording of his vote is completed.

Entered on the poll for Mr. Forbes. This entry was objected to and his vote was claimed for the petitioner.

One of the poll-clerks for the Falkirk district proved that the practice at the last election was for each voter to give his name and parish; the sheriff then referred to the Register for his number, and these particulars were written down by the poll-clerk. The voter was then asked by the sheriff for whom he voted; and on the voter's answering, the initial of the name of the candidate for whom he voted was entered by the poll-clerk in the same line with the entry of the name, number, and parish, and the number on the poll was carried out. The same course was adopted in the case of the voter Bow; and in answer to the question of the sheriff, he said he voted for Mr. Forbes. Whilst the poll-clerk was writing the letter F., the voter corrected himself, and said he voted for Colonel Abercrombie. The poll-clerk finished the letter F., but did not carry out the number. A question was then raised before

(1) *Supra*, 295.

1838.

the sheriff as to which candidate was entitled to the vote. The agents for Mr. Forbes contending that a voter could not be allowed to correct himself after his vote had been recorded, whilst the agents of Colonel Abercrombie argued that the vote had not in fact been recorded, and that the entry could not be considered perfect till the number was extended. The sheriff, an advocate of considerable practice at Edinburgh, decided that the voter had voted for Mr. Forbes, and that the entry could not be altered; and he directed that the number should be extended, which was done, and the vote reckoned in favour of Mr. Forbes. The voter did not appear intoxicated or hurried; there was nothing peculiar in the case till he corrected himself.

Mr. *B. Andrews* trusted the Committee would remove the vote from the poll of the Sitting Member and add it to the poll of the petitioner. By the Scotch Reform Act, 2 & 3 Wm. 4, c. 65, s. 32, the recording a vote on the poll-book is not complete till the consecutive number is carried out. There is no doubt that a voter may correct himself at the poll at any time before his vote is finally recorded. A similar instance to the present occurred in the *Reading case*,⁽¹⁾ and the vote was allowed to be entered according to the intention of the voter, notwithstanding a mistake in his first giving the name of the wrong candidate. In all the cases in which the voter has not been allowed to correct a mistake, the recording of his vote has been completed before he discovered his mistake; this was the ground of the decision in *Llewellyn's case, Monmouth*.⁽²⁾ Here the entry of the progressive number is an essential part of the recording a vote. But even if the entry of the number be not essential, at least the letter F. must have been completed before the vote was recorded for Mr. Forbes. In order to shew that this was a mere mistake, the petitioner is prepared, if necessary, to produce the

(1) *Infra*, 555, 6.

(2) K. & O. 413.

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poll-books of the two previous elections, from which it will appear, that he voted for Colonel Abercrombie at both those elections.

Mr. *Austin*.—The evidence just alluded to has not been put in, and if it had been, it would not in the least have borne on the question which the Committee will have to decide. But there is one consideration which has not been adverted to, and which is very material, namely, that this point has already been decided by a competent tribunal, and that the petitioner is now appealing to the Committee from that decision. Mr. Rollo, the sheriff, an advocate competent to decide the law, was present, saw the whole transaction, saw the voter enter the booth, put the question to him, received the answer, saw it entered, and there on the spot, with all the materials before him for enabling him to form a right judgment, with the conduct of the voter fresh in his recollection, decided that the vote was recorded and could not be altered. The Committee have nothing to do with an inquiry into the intention of the voter, they are only to inquire what answer was given by the voter, and whether that answer was recorded. The objection taken before Mr. Rollo was, that the progressive number was not entered in the poll-book, and the question is, whether the entry of the progressive number is essential to complete the record of the vote. By s. 32, the sheriff shall receive the votes, and shall record and progressively number each vote, and he and the clerk shall subscribe their names to each page of the poll-book before any entry is made in the succeeding page. The receiving a vote is the putting the question and receiving the answer, recording of a vote is the putting some mark on the book to denote for which candidate the party has voted, and in this case the vote had been received and recorded when the letter F. had been entered. The entry of the progressive number is not at all essential to the completion of

1838.

the record of the vote, for there is nothing in the statute requiring the progressive number to be entered at the instant of the recording of the vote. It is quite a sufficient compliance with the statutes, if the progressive numbers are entered at any time before the names have been signed at the bottom of the page. Even if this were omitted, although it would be a culpable neglect on the part of the sheriff, yet the poll-book would be good. If no progressive numbers were entered at all, and if the several pages of the poll-book were not signed by the sheriff, the omissions would not vitiate the poll. It is too absurd to suppose that any Committee would strike off a vote because the progressive number was not properly entered, or on account of the non-observance of any other mere directory clause as to the manner of taking the poll. It would be dangerous to lay down as a principle that the entry of the progressive number forms part of the record of the vote; for if the progressive number is essential, so must the signature of the names at the bottom of the page be; and it would follow that the vote which stands first on the page is not recorded till the page is completed. Nor does the argument rest here, but it carries with it as a necessary consequence, that every voter on the list is at liberty to alter his vote at any time previous to the final signature of the names at the bottom of the page. The whole question is, was the vote recorded, and for that purpose the statute alone must be looked at.

Resolved.—That the vote of W. Bow be struck off the poll of Mr. Forbes, and placed on the poll of Mr. Abercrombie.

Mr. Forbes then retired from the contest, and Lieutenant Colonel Abercrombie was reported to the House to have been duly elected.

CASE XIX.

READING.

The Committee was chosen on the 6th of March, 1838, and consisted of the following members :—

Sir Thomas Trowbridge (Chairman), <i>Sandwich.</i>	
Henry Combe Compton, Esq. <i>Hants, S.</i>	Spencer Horsey de Horsey, Esq. <i>Newcastle-under-Lyme.</i>
Hon. Pierce Butler. <i>Kilkenny, Co.</i>	Hon. James Hope Johnston. <i>Dumfries, Co.</i>
Charles Crespigny Vivian, Esq. <i>Bodmin.</i>	John Studholme Browrigg, Esq. <i>Boston.</i>
John Hyacinth Talbot, Esq. <i>New Ross.</i>	Lord Viscount Alford. <i>Bedfordshire.</i>
Hon. Charles Compton Cavendish. <i>Sussex, E.</i>	John Dunlop, Esq. <i>Ayrshire.</i>

Petitioners—

Voters in the interest of Mr. Russell.

Counsel for the Petitioners—

Mr. Rogers, Q. C., Mr. Austin, and Mr. Talbot.

Agents—Messrs. Burke and Venables.

Sitting Member—C. F. Palmer, Esq.

Counsel for Sitting Member—Mr. Serjt. Merewether, Q. S. and Mr. Hill, Q. C.

Agents—Messrs. Vizard and Leman.

The numbers at the close of the poll were :—

Mr. Serjt. Talfourd . . . 468

Mr. Palmer 457

Mr. Russell 448

After the poll-books had been put in, it was proved that an arrangement had been entered into at the election which was reduced into writing, and of which the following was a copy : “ Four minutes before nine, an ar-

rangement was entered into between the agents of the respective candidates, that they would not object to any of the voters whose names were on the register, and who had not previously polled."

1838.

An objection was argued as to the admissibility of this paper in evidence, and the Committee

Resolved.—That the paper tendered may be received in evidence, but that such document is not binding on the petitioners.

THOMAS FIFE'S CASE.

Registered as inhabitant householder, voted for Serjeant Talfourd and Mr. Palmer, objected to for change of qualification.

Conclusive evidence necessary to disfranchise a voter.

It was proved that, in July, 1836, the voter occupied the premises, for which his name stood on the register, as a beer shop, that on the 2nd of June, 1837, he removed to another house, his wife continued to sell beer on the premises for which he had been registered, and Fife's name continued over the door, up to, and after the election, but Fife had stated to one of the witnesses, that his wife sold the beer in those premises, as servant to a person of the name of Lewis, it also appeared that Lewis had paid rent to the owner of those premises, from the 2nd of June, 1837.

Mr. Rogers.—Voter must be in occupation as owner of the tenement, Reform Act, section 27. 1st. Fife was not in occupation after the beginning of June. 2nd. If he occupied at all, it was not in the character of tenant, as appears by his own declaration.

Mr. Hill.—If the voter occupies as tenant, it is immaterial whether he is tenant to the original landlord or under-tenant. It is admitted, that Fife's name was over the door, and that he and his wife occupied up to

1838. the time of the election. Every thing will be presumed in favour of the vote, and as Lewis has not been called, it is fair to presume that Fife continued to occupy as under-tenant to Lewis.

Vote held good.

CHARLES BOWEN'S CASE.

Committee will entertain an objection to a voter although third question not put at the poll.

Registered as 10*l.* householder, voted for Serjeant Talfourd and Mr. Palmer, objected to for change of qualification.

Mr. *Hill* objected that the third question had not been put at the poll. The point was fully argued by Mr. *Hill* in favour of the objection, citing the *Canterbury case*, (1) and *Ipswich case*; (2) and by Mr. *Rogers* against it, citing *Bedford case*, (3) *Southampton case*, (4) *Rochester case*, (5) *Windsor case*, (6) *Worcester case*, (7) and *Monmouth case*. (8)

Resolved.—That the counsel for the petitioners do proceed with the case of Charles Bowen. (9)

The case was then gone into, and the vote struck off.

JAMES HOLTON'S CASE.

Conclusive evidence necessary to disfranchise a voter.

Registered as a 10*l.* householder, voted for Mr. Palmer, objected to for change of qualification.

The voter carried on the business of a licensed victualer and publican, in July, 1836, in the house for which he was registered, he removed from the house in November, 1836, at which time a person, named Wilkins,

(1) K. & O. 325, 326.

(2) K. & O. 386.

(3) P. & K. 144.

(4) P. & K. 236.

(5) K. & O. 72.

(6) K. & O. 170.

(7) K. & O. 239.

(8) K. & O. 411.

(9) The arguments on this question have been fully given in the *Walsall*, *supra*, 358, *Shaftesbury*, *supra*, 366, and *Bedford*, *supra*, 430; also, see *Evesham*, *supra*, 532.

went into the house, the name over the door was changed and Wilkins continued to carry on the same business, 1838.
The house belonged to a firm of brewers, consisting of two partners; one of the partners was called as a witness, and proved that before Holton left the premises Wilkins had applied to him to take them, so he gave his consent, but the actual arrangement under which Wilkins entered on the premises was made with the partner of the witness; that the witness had received money from his clerk, which the clerk told him was half-a-year's rent from Wilkins to the Spring of 1837, but he had never personally received rent from Wilkins. The assessed tax collector proved, that he had received the assessed taxes from Holton, up to November, and subsequently from Wilkins, under the direction of Holton.

Mr. Rogers against the vote.—Here the landlord has been called, and although he does not prove either the express terms of Wilkins's tenancy, or the actual receipt of rent from him; yet this evidence completely establishes the fact, that Wilkins and not Holton was his tenant from November, 1836. And the payment of assessed taxes by Wilkins under the directions of Holton, shows that Holton admitted himself to have ceased to occupy.

Mr. Serjt. Merewether in support of the vote.—If the landlord had proved that the former tenancy had actually determined in November, and that Wilkins had then began to occupy the premises as tenant, the case against the vote would have been made out. But it is quite consistent with the landlord's evidence, that Holton continued to be tenant, and continued to carry on the business. By statute 9 G. IV. c. 61, s. 1, the general licence day of publicans in the country is between the 20th of August and the 14th of September, hence it is probable that Holton's licence would continue in force till September 1837. And as the business was continued to be carried

1838. on, and no transfer of the licence to Wilkins has been proved, nor has the tenancy of Holton been proved to have determined, it may fairly be presumed that it was carried on for Holton.

Vote held good.

THOMAS BALDING'S CASE.

Conclusive evidence necessary to disqualify a voter.

Registered for a 10 $\frac{1}{2}$ house, Broad-street, but the number of the house was not given in the register ; voted for Palmer ; objected to for change of qualification.

The voter was the owner of two houses, Nos. 96 and 97, in Broad-street. Before Christmas 1836, he lived himself in 96, and a person by the name of Barnes lived in 97, in which house he had lived for many years, and carried on trade there. At Christmas 1836, Barnes removed from 97 to another house ; the voter removed at the same time from 96 into 97, and continued to live in 97 till the election. At Christmas 1836, a person by the name of Bond, who was examined as a witness, became tenant to the voter of 96, and occupied it from that time down to and after the election.

Mr. *Talbot* against the vote.—This is a very simple case. The voter lived in No. 96 at the time of the registration in 1836. At that time, and for years previously, Barnes had lived in 97. Hence the voter must have been registered for 96, and after the registration and before the election, he removed from 96, and was succeeded by a fresh occupier.

Mr. *Hill* in support of the vote.—If the voter was registered for No. 96, then he has lost his vote. But the register mentions no number, and the voter might have been in a position to be registered either for 96 or 97. Supposing Barnes carried on trade in 97 as servant to the voter, the voter then would be entitled to have been

registered for that house, and his qualification would not have undergone any change.

1838.

The *Committee*, after some deliberation, wished the witness Bond to be called and further examined; on such further examination, it appeared that the witness did not know the terms on which Barnes occupied No. 97, up to the time of his removal.

Vote held good.

GEORGE HATTON'S CASE.

Registered for a 10*l*. house; voted for Mr. Russell; objected to for change of qualification, and on three other grounds.

Application for statement of particular ground of objection.

Mr. *Rogers* called on his opponents to state on what ground of objection they meant to proceed. There were four objections to the present vote stated in the lists, and as such objections were all inconsistent with each other, it was impossible for the petitioner to know what objection they had to answer. In addition to the necessity of knowing the nature of the case brought against the voter, there was another reason which made him desirous of having the ground of objection precisely named, before the inquiry was entered upon. It was the practice to classify the votes, and to require a party to proceed with a class upon which he has once begun. He wished to prevent his opponents from having an opportunity of shifting their class to any of the four heads specified in the objection to the present vote.

Mr. Serjt. *Merewether* protested against being called upon as a matter of right by his opponent to state upon which out of several objections he intended to rely. At the same time, he was willing in the present case, to inform his opponents that the ground which was intended

1838. to be first entered upon, was a change of qualification between the registration and election.

The *Chairman* stated, that as the requisite information had been given to enable the case to be proceeded with on one ground, any objection to the right of a party to attack the voter on any other ground, had better be deferred till the attempt should be made.

The evidence on the charge of qualification was then gone into.

Vote held bad.

CHARLES JAMES BUTLER'S CASE.

Adjournment
to allow voter
to produce evi-
dence in sup-
port of his vote.

Registered for a 10l. house; voted for Mr. Russell; objected to for change of qualification.

The voter paid rent for the house up to Michaelmas 1836, and at that time gave up the key of the house. It was not proved that Butler had been in personal occupation of the house after the 31st of July. A bill had been placed in the window, "This house to let, inquire within." This bill remained up till Michaelmas, and the voter's wife had been seen in the window by a person passing by the house whilst the bill was up, but the witness could not state positively whether this was before or after the 31st July. At Michaelmas 1836, the house was occupied by a fresh tenant.

Mr. *Hill* summed up the evidence against the vote, and contended that the evidence established that the voter was in occupation subsequently to the 31st July 1836, and had subsequently quitted.

Mr. *Rogers* in support of the vote, read the answers of the witness, which shewed that he was unable to speak with any precision as to the time when the voter had ceased to occupy the house, and commented on these answers, which shewed that the voter might have ceased

occupation prior to the 31st July 1836, in which case, the objection ought to have been taken at the registration, and he cited *Draper's case, Southampton*. (1) 1838.

Resolved.—That the consideration of this vote be adjourned, to give the petitioners an opportunity of calling witnesses, to prove whether the voter in fact left his house before the 31st July.

At the next meeting of the Committee, the petitioners preferred to leave the case as it stood.

Vote held bad.

After this case, a considerable number of votes were struck off on both sides, without any case of interest having occurred, when a difference of opinion arose between the agents as to the true state of the poll, the agent for the petitioners contending that the Sitting Member was only in a majority of two, and the agent for the Sitting Member claiming a majority of three.

Mr. Serjt. *Merewether* applied to the Committee to pronounce which statement was correct.

The *Chairman*.—The parties had better arrange that matter between themselves. (2)

PIERRE CHAVILLE DE BARTHES,

Voted for Mr. Palmer, objected to, for being an alien, the objection had not been taken before the revising barrister. Case of an alien.

Mr. Serjt. *Merewether* objected that the case could not be gone into without opening the register.

Mr. *Rogers* contended that an investigation into this question did not involve the opening of the register. Statute 2 Wm. IV. c. 45, s. 27, in addition to registration,

(1) P. & K. 231. C. & R. 122.

(2) Great confusion frequently arises from the difficulty of ascertaining the numbers of the poll accurately during the progress of a case.

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requires that the voter shall be of full age, and not subject to any *legal incapacity*. These words enable the Committee to enter into such an inquiry as the present, although no objection were taken at the registration. If it were otherwise, a woman whose name had been placed on the register by mistake, and who had not been objected to, might vote without risk of being struck off.

Resolved.—That counsel may produce evidence to shew the legal incapacity of the individual in question to vote. (1)

Pierre Barthes, brother of the voter, proved that he was a native of Bordeaux, and ten years older than the voter. That the voter was born at Bordeaux, whilst he was living in his father's family. That the voter came to England in 1826, and had not, to the knowledge of the witness, been naturalized, or received letters of denization.

Mr. Serjt. *Merewether*.—The case made against the voter is quite consistent with his having been naturalized or received letters of denization. The witness who has been called is unable to give any information on this subject, and as the voter's disqualification may have been removed in either of these modes, it is fair to presume, in the absence of evidence to the contrary, that the disqualification has been removed.

Mr. *Rogers*.—Surely it cannot be seriously contended that the party attacking a vote is bound to prove a negative, that after having proved a voter to be an alien, he must go on and shew that the voter has never had his incapacity removed.

Vote held good.

(1) But see *Godfrey Levi's case*, *supra*, p. 437.

1838.

RICHARD IRON'S CASE.

The voter had been a claimant to register before the barrister at the last registration, and his claim, after being objected to by the agent of certain parties who attended the registration court, was admitted; he was objected to before the Committee, on the ground that the premises occupied by him were not of sufficient value to entitle him to be registered.

Evidence not restricted to that given before revising barrister.

Mr. *Rogers* proposed to call a witness who had not been examined before the revising barrister.

Mr. Serjt. *Merewether* objected.

Mr. *Rogers* cited the *Monmouth case*. (1)

Resolved.—That the Committee before permitting an objection in the nature of an appeal from the decision of the revising barrister, will require the grounds of the objection, *bonâ fide* made and insisted upon, to be proved, and the evidence confined to those grounds, but they will not restrict the evidence of either party to that given before the barrister.

THOMAS HALL'S CASE.

The objection to this vote was, that the voter having voted for Mr. Russell and Mr. Serjeant Talfourd, his vote was erroneously recorded in favour of Mr. Palmer, and ought to be struck off the poll of Mr. Palmer, and added to that of Mr. Talfourd.

A clerical error in the poll allowed to be rectified.

The voter went up to poll in company with the witness, who heard him distinctly state that he voted for Russell and Talfourd. Finding after he had left the polling-booth, that an error had been committed in taking down his vote, he went to the witness and asked him to return

(1) K. & O. p. 412.

1888. to the poll-book to have the mistake corrected. This was about three quarters of an hour after he voted. It appeared that the poll-clerk had been very unwell during the day, and had made other mistakes.

A check-clerk swore that the voter polled for Russell and Palmer, and the poll-clerk was unable to say that he had in this case entered the vote erroneously. The evidence, however, to establish the commission of the mistake was clear and distinct.

Mr. Serjt. *Merewether* contended that the poll-book was a record which could not be altered, except in cases where the evidence of error was most conclusive. Here some time elapsed before the voter applied to have the alleged mistake corrected, and the poll-clerk was not aware that the vote was erroneously taken down.

Mr. *Rogers* admitted that if a vote is distinctly recorded as it is given, the entry of it could not be altered. But the vote given, is not recorded, if it is not entered on the poll. The vote to be recorded was for Mr. Palmer, and not for Mr. Serjeant Talfourd.

It was resolved, that the vote be struck off the poll of Mr. Palmer and added to that of Mr. Serjeant Talfourd.

THOMAS CLIFT'S CASE.

It was presumed in favour of the manifest intention of a voter that the original entry on the poll was a clerical error.

It was objected that this voter having in fact voted in favour of Mr. Russell and Mr. Palmer, and his vote having been recorded on the poll accordingly, the poll was afterwards improperly altered, and the vote recorded in favour of Mr. Russell erased, and added to the poll of Mr. Serjeant Talfourd.

The voter, upon coming to the poll, was asked for whom he voted, he said Russell and Palmer: upon this, the agent of Mr. Russell gave him a card of thanks; upon receiving the card, he turned round as he was in the act

of going away, and said "that he did not mean to vote for Mr. Russell, he meant to vote for Mr. Serjeant Talfourd." This he said before he left the front of the polling place, and before he had communicated with any person, but after he had removed a slight distance from the spot where he stood when he voted. The matter was referred to the mayor, and the poll was altered. 1838.

Mr. Rogers.—There is probably no principle in election law more clearly settled than that a vote, after it has been once recorded, cannot be altered except for a clerical error. The poll is a record of facts, not intentions. If you once embark in an inquiry into the intentions of a voter, where is to be the limit? Is evidence to be given of declarations previously made by him, of his votes at previous elections, of the stability or instability of his character? The act of voting, when once completed, cannot be recalled: if a voter should be allowed to change once, why not twice; where are you to stop? In these cases the strict rule is the only safe one, and the evils and uncertainty which must arise from relaxing the rule are endless. In *Llewellyn's case, Monmouth*, (1) it was held that a vote once recorded cannot be altered, yet there the vote was indisputably contrary to the intention. (2) Such are the arguments which would have applied against altering the original entry, if that entry had remained untouched, and the mayor had not interfered by altering the poll in the unwarrantable manner in which he did. But in the present case the mayor, after the vote had been recorded according to the expressed answer of the voter, has deliberately taken on himself to alter the poll. The Reform Act, 2 Wm. IV. c. 45, s. 58, has expressly provided that there shall be no scrutiny by the returning officer. Since the passing of that act the mayor's duties are merely ministerial; he is only to receive the votes and enter them ac-

(1) K. & O. 413.

(2) See *White's case, Taunton, supra*, 299.

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ording to the fact. Even if the mayor might, consistently with the evidence, have been right in point of fact, it would be dangerous, except in a clear case, to sanction any interference with the entries of the poll by the mayor. How much more dangerous to sanction his act, where he was wrong in point of fact, and only acted in consequence of some vague evidence of intention.

Mr. Serjt. *Mercwether*.—The argument that it would be dangerous to sanction the interference of the mayor with the poll to correct an obvious error, is a most unsafe one to be acted upon. Is it to be contended that the returning officer is not to set right a mere slip of the pen; that he is to make a return which he knows to be erroneous, because he is to be too delicate to set right an accidental mistake of one of his poll-clerks? Many of the principles contended for by the other side may be conceded. It is conceded that the poll cannot be altered after the vote has been rightly recorded. But in this case the vote was not rightly recorded, and the mayor very properly corrected it.

It was resolved.—"That the vote remain as it at present stands on the poll for Mr. Palmer and Mr. Serjeant Talfourd."

HENRY CORDEROY'S CASE.

The same presumption made although the error was not discovered by the voter himself.

The objection in this case was similar to the last. The voter came to the polling place and gave his vote for Russell and Talfourd. Having done this, a Mr. Evans, who polled at the same time, took him back about three feet from the polling place and made some remark to him, when the voter came forward to the poll-clerk and said, "that he had made a mistake in polling for Russell and Talfourd, and that he meant to have voted for Palmer and Talfourd." It was stated that the poll could not be altered; but upon Mr. Weedon, an agent of Mr. Palmer

saying, that it was allowable to alter the poll, if the party had not left the booth, the polling-clerk, in the absence of the mayor, altered the poll. The poll-clerk, in his evidence, represented the vote given for Russell to have been recalled almost instantaneously, but admitted it to have been entered on the poll. 1838.

After hearing Mr. *Talbot* and Mr. Serjeant *Merewether*, the Committee *resolved*,—"That the poll remain as at present recorded."

Mr. Russell then retired from the contest, and the Committee reported that Mr. Palmer was duly elected.

CASE XX.

KINGSTON UPON HULL.

The Committee were chosen on the 15th of March 1838, and consisted of the following Members:—

Sir George Strickland, Bart. (Chairman), <i>Yorkshire, W. R.</i>	
F. Dundas, Esq.	A. Hastie, Esq.
<i>Orkney and Shetland.</i>	<i>Paisley.</i>
G. A. Muskett, Esq.	J. R. O. Gore, Esq.
<i>St. Albans.</i>	<i>Carnarvonshire.</i>
Cornelius O'Brien, Esq.	S. White, Esq.
<i>Limerick Co.</i>	<i>Leitrim Co.</i>
Nicholas Fitzsimon, Esq.	Hon. Charles Langdale,
<i>King's Co.</i>	<i>Knarborough.</i>
Sir W. L. Young, Bart.	Lord Viscount Adare,
<i>Bucks.</i>	<i>Glamorganshire.</i>

Petitioners—

Electors in the interest of Messrs. Hutt and Wood.

Counsel—Mr. Hill, Q. C., Mr. Austin, and Mr. Rushton.

Agent—Mr. Crouch.

Sitting Members—W. Wilberforce, Esq. and Sir W. C. James, Bart.

Counsel—Mr. Thesiger, Q. C., Mr. Hildyard, and Mr. Wrangham.

Agent—Mr. Stephens.

The property specified in the statement of qualification delivered in by Mr. Wilberforce was objected to, as not giving to Mr. Wilberforce an estate for his own life, either in law or in equity, of the annual value of 300*l.* within the meaning of 9 Anne, c. 5. The recent statute, 1 & 2 Vict. c. 48, renders the questions which were raised inapplicable to future cases; but we think it right to mention them, on account of the contradictory opinions written

upon them by eminent conveyancers. Mr. Wilberforce claimed the property in question under the limitations of his father's will. 1838.

The following is a brief abstract of the principal provisions of the will relating to the property in question. Those provisions commenced by giving a general power of sale to trustees, without power in any one to control or restrain them. Power to the trustees to revoke all the uses and trusts of the will. Declaration, that the trustees shall have power to sell without any further concurrence notwithstanding any rule of law or equity to the contrary, and that the receipt of the trustees should be a good discharge to purchasers. The trusts of the purchase monies were to pay the testator's debts and legacies, and then to invest the surplus in the purchase of estates to be settled to the uses of the will, with an intermediate direction for placing the monies out at interest. Then followed a charge of 500*l.* a-year on the real estates, and subject and without prejudice to the powers and charges before contained. The testator gave his freehold real estates to the uses following, viz.—*To the use*, that the trustees might receive the last-mentioned annual charge of 500*l.*, and subject thereto to the use of the said William Wilberforce for ninety-nine years, if he shall so long live, without impeachment of waste, with remainder to the use of trustees during the life of the said William Wilberforce, upon trust to pay over the rents and profits to the said William Wilberforce, with divers remainders over.

Mr. *Humphry* (1) took two objections. 1st. That Mr. Wilberforce had not an equitable freehold of the value of 300*l.* a-year. He contended that in all cases where a person was possessed of a legal chattel interest in possession, with an equitable freehold in remainder, the two estates remained distinct. That if the chattel interest

(1) Who appeared merely to argue the question of qualification.

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were of such a nature as to continue after his death, it passed to the executor and not the heir; that such chattel interest was liable to be taken in execution like other personalty, and that for all purposes it was personal and not real estate. That Mr. Wilberforce's income arose out of the chattel interest for ninety-nine years, and not out of the equitable remainder. The 2nd objection was that the power of sale and declaration were unusual, and had the effect of making the estate defeasible.

Mr. *Thesiger* contended, 1st. That Mr. Wilberforce was entitled to the rents and profits for life, and had virtually an equitable freehold in possession. 2nd. That there was no solid distinction between the power of sale which overrode Mr. Wilberforce's estate, and the ordinary powers of sale which were to be met with in the titles of half the land in the kingdom.

Resolved.—That Mr. Wilberforce was not duly qualified.

The most important of the decisions of this Committee, were on questions of treating, respecting which they adopted strict rules, and rigidly adhered to them. Towards the close of the case, after eighty-four voters had been struck off from the poll of the Sitting Members, Mr. Hutt being at the head of the poll, and Mr. Wilberforce nine votes a-head of Sir W. C. James, the counsel for the Sitting Members stated that Sir W. C. James was in a minority of one below Mr. Wood. (1) The counsel for the Sitting Members then proposed to attack the poll of their opponents, but were met by the following novel objection. The names of the petitioners were Frank Rawson, George Binckes, the younger, and *John* Bickerton, the list of votes objected to on behalf of the Sitting Members, purported to be in the matter of a petition of Frank Rawson, Georges Binckes, the younger, and *George*

(1) Printed Minutes of Evidence, p. 469.

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Bickerton. It was argued on behalf of the petitioners that the difference between the names in the petition and those in the heading of the lists, was a fatal variance, and of that opinion were the Committee. The counsel for the Sitting Members then stated that Sir W. C. James was not in a minority, but that both parties were equal; it was contended on the other side, that he was bound by his previous statement, and the question was referred to the Committee, who directed the short-hand writer's note of what had occurred to be read, (1) but declined to interfere. The petitioners then proposed to strike off another vote from the poll of the Sitting Members, but it was objected that there was a similar clerical error in the heading of their lists, which was a fatal variance from the petition. The name of one of the petitioners was stated in the petition to be George Binckes, "the younger;" he was described in the heading of the list of the petitioners merely as George Binckes; the Committee held the variance fatal. An arrangement was then come to between Sir W. C. James and Mr. Wood, by which Sir W. C. James was allowed to put ten votes on the poll, which were alleged to have been tendered for him, without any evidence being offered; he thus placed himself in a majority over Mr. Wilberforce, and the Committee reported that W. Hutt, Esq., and Sir W. C. James had been duly elected.

(1) Printed Minutes of Evidence, p. 473.

CASE XXI.

SLIGO.

This Committee was appointed upon February 15th, 1838; and consisted of the following Members :—

John Parker, Esq. (Chairman), <i>Sheffield.</i>	
Thomas Bewes, Esq. <i>Plymouth.</i>	Sir H. Hume Campbell, Bart. <i>Berwickshire.</i>
Francis Aglionby, Esq. <i>Cumberland, E.</i>	Sir Richard Phillips, <i>Haverford, West.</i>
George Henry Dashwood, Esq. <i>Wycombe.</i>	Earl of Euston, <i>Thetford.</i>
Thomas Dundas, Esq. <i>Richmond.</i>	Lord Russell, <i>Tavistock.</i>
Richard Monkton Milnes, Esq. <i>Pontefract.</i>	Rowland Alston, Esq. <i>Hertfordshire.</i>

Petitioners—Electors in the interest of John Martin, Esq.

Counsel for the Petitioners—

Mr. Thesiger, Q. C., Mr. Austin, and Mr. Montagu Smith.

Agent for the Petitioners—Mr. Moffat.

Sitting Member—John Patrick Somers, Esq.

Counsel for the Sitting Member—Mr. Harrison, Q. C., and Mr. E. Dowling.

Agent for the Sitting Member—Mr. Baker.

The petition alleged that the Sitting Member was not duly qualified by estate to sit in Parliament. It stated that at the first close of the poll the numbers were—for John Patrick Somers, 262; and for John Martin, 258; and it prayed that the name of John Martin might be substituted for that of John Patrick Somers, and that the election and return of the said John Patrick Somers might

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be declared to be null and void. There were, also, allegations of bribery, treating, and riots, which were abandoned.

The question relating to the qualification of the Sitting Member resolved itself into one of value, and very conflicting evidence was given upon it.

It was resolved.—That the petitioners had failed in establishing, by proof, the alleged want of qualification of the Sitting Member. (1)

Mr. *Harrison* applied to the Committee to declare the petition to be frivolous and vexatious. The petition was got up by persons who were strangers to the Borough of Sligo for the express purpose of harassing the Sitting Member; and he should be able to establish the fact that the fund to sustain it was called the “Spottiswoode Subscription, or Irish Election Petition Fund.” In the *Carrickfergus case*, (2) Sir George Rich was compelled to produce the books of the Dublin Conservative Society. The question, who were the parties to the petition, and whether the persons named in the petition were *bond fide* the petitioners, had frequently been entertained. In the *Bridport case*, (3) the petitioner under the 9 Geo. 4, c. 22, s. 39, was compelled to prove that he had only signed the petition upon Colonel St. Paul, the unsuccessful candidate, undertaking to indemnify him.

Mr. *Thesiger*.—In the *Carrickfergus case*, the books of the Conservative Society were produced for the express purpose of supporting a specific charge of bribery alleged in the petition, and which was one of the principal subjects of inquiry before the Committee. The books were called for to trace certain sums of money, and were produced in the same manner as bankers' books are, and for a similar

(1) It was understood that the Committee, previous to their coming to this resolution debated for some time upon the propriety of adjourning, to enable the petitioners to produce a witness who had, as they stated, absconded to avoid being served with the Speaker's warrant.

(2) P. & K. 534.

(3) MS.

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purpose. In this instance, it is not within the jurisdiction of the Committee to inquire whence the funds come with which this petition is prosecuted. It is not among the matters and things submitted to its investigation.

The Committee *resolved*.—That the Sitting Member should not be allowed to go into proof as to the origin of the funds, until he had given evidence to impugn the *bona fide* character of the petition.

The next day Mr. *Harrison* stated, that he had some doubt if he should be able to give any evidence of the character of the petition, and that he considered himself to be precluded, by the terms of the resolution that had been made, from proceeding further.

In this case the poll-books were produced, together with the usual affidavit, by the clerk of the peace of the county of Sligo.

Mr. *Harrison* objected to the reception of the poll-books, as not being produced out of the custody of the proper officer. The 1 Geo. 4, c. 11, s. 3, regulates the statutable proof of the poll. The books ought to have been delivered to the party in whose custody the records of the borough are kept; and if they are not produced from his custody, they must be verified by the ordinary evidence.

Mr. *Thesiger*.—The production of the books by the clerk of the peace is sufficient. They were delivered to him at the close of the poll; they are authenticated by the affidavit, and there is no suspicion of their having been improperly dealt with. *Clonmell case*, (1) *Ennis case*, (2) *Cork City case*, (3) *Belfast case*. (4)

Mr. *Harrison*.—When it is intended to rely upon the mode of proof given by the statute, it must be strictly

(1) P. & K. 426.

(3) K. & O. 274.

(2) K. & O. 433.

(4) *Infra*.

followed. In the *Clonmell case*, the books were proved to have been in the same state as when they were delivered up. In the *Ennis case*, the deputy of the returning officer was called, who examined and authenticated the books. The *Cork City case* related to a defective affidavit. The *Belfast case* is not entitled to weigh against the other cases.

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The Committee *resolved*.—That sufficient evidence of the authenticity of the poll-books had not been produced.

Mr. Ormsby, the returning officer of the borough, at the last election, was then called, who having examined and authenticated the poll-books, Mr. Harrison made no further objection to their being received.

It was resolved.—That John Patrick Somers, Esq. was duly elected a burgess to serve in this present Parliament for the borough of Sligo, and that neither the petition nor the opposition to it were frivolous or vexatious.

CASE XXII.

WATERFORD.

This Committee was appointed upon Thursday, the 3rd of May, 1838, and consisted of the following Members.

William Miles, Esq. (Chairman), <i>Somersetshire, E.</i>	
Sir Edward Kerrison, Bart.	Richard Blakemore, Esq.
<i>Eye.</i>	<i>Wells.</i>
Thomas Peers Williams, Esq.	T. A. Wolstenholme Parker, Esq.
<i>Great Marlow.</i>	<i>Oxfordshire.</i>
William Wilshere, Esq.	Henry Combe Compton, Esq.
<i>Great Yarmouth.</i>	<i>Hampshire, S.</i>
William Nugent Macnamara, Esq.	John Maher, Esq.
<i>Clare Co.</i>	<i>Wexford Co.</i>
John Henry Lowther, Esq.	John Ennis Vivian, Esq.
<i>York.</i>	<i>Truro.</i>
Petitioners—Electors in the interest of W. Beresford, Esq.	
Counsel for the Petitioners—Mr. Thesiger, Q. C. and Mr. Wrangham.	
Agents for the Petitioners—	
Messrs. Dorington, Heyward, and Ellicombe.	
Sitting Member—Henry Winston Barron, Esq.	
Counsel for the Sitting Member—Mr. Joy, Q. C. and Mr. Austin.	
Agent for the Sitting Member—Mr. Baker.	

The petition charged various acts of bribery and of treating, as having been committed by the Sitting Member, his agents, and friends, at the election for the city of Waterford. There were also, contained in it, allegations of riot, intimidation, obstruction of the poll, and personal misconduct of the Sitting Member, but no other charge, but that of bribery, was brought under the notice of the Committee.

Thomas Jackson, a clerk in the Crown Office, produced the writ for the election, to the sheriffs of Waterford, and the return duly indorsed.

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Richard Cooke, the clerk of the peace for the city of Waterford, produced the alphabetical list of registered voters, made out according to the 2 & 3 Wm. IV. c. 88, s. 35. He had compared every name in it with the original affidavits.

Mr. *Joy* objected to the reception of this list in evidence. It was merely a copy of certain entries in original affidavits of registry, which ought to have been produced. There was no reason assigned for the non-production of the proper documents.

Mr. *Wrangham*.—Under the 20th section of the Irish Reform Act, the affidavits of registry signed by the barrister, are to be filed and kept among the records of the county, city, or borough, to which they relate. If, therefore, this list was a copy, still, as a copy of that which is filed of record it is admissible. But it is not in fact a copy, but an original list made out in conformity with the statute. By the Irish Reform Act, section 35, this list is directed to be prepared, and in sect. 40, it is called the “register of voters.” The purpose for which it is offered in evidence, is merely to give the formal proof that a person named in it is registered as a voter. It is not intended to enter into a scrutiny, for then, as the title of the voter would be attached, it would be necessary to produce his original affidavit; the list contains the names of the electors, and the dates of their registry, and is good *primâ facie* evidence of the facts which the act directs that it shall specify. It is produced by the person who is authorized to prepare it, and who extracted the particulars it contains, from the records that are in his custody, [Major *Macnamara*, could a voter have polled from this list?] The act specially directs that the voter shall

1838. poll from his certificate, and in default of its production, from his affidavit. But it is not proposed to refer to the list as conclusive evidence of a title to vote, but merely as *prima facie* evidence, and that a person named in it, had, or claimed to have a right to vote. In the *Dublin case*, (1) a similar list was received.

Mr. Joy.—This list affords no evidence of the right of any voter to poll. The certificate, or affidavit, may prove that fact, but this list cannot be admitted in substitution of them; it is merely a list, and it is so called in the act, and it is made out for the convenience of the returning officer; it consists of copies of entries, and as copies they cannot be read. There is no instance in which it has ever been received for the purpose for which it is offered. There is no reason or excuse assigned for the non-production of the original documents.

Resolved.—That the Committee cannot receive the printed lists which have been offered in evidence.

It was then proposed to proceed upon the evidence of the voter himself, and to relate what passed between him and the Sitting Member, with regard to an alleged act of bribery, without first producing the poll-books. This was objected to. The poll-books were in the possession of the clerk of the peace, and he had them in the room with him, but the usual affidavit of the returning officer, in verification of them, had not been delivered to the clerk of the peace, and he believed that it had not been made.

Mr. Wrangham.—As far as regards any scrutiny, this case is at an end; all that the petition contains relating to it, has been abandoned. It is simply contended that by reason of acts of bribery, the election is invalid. It is not the validity of a vote, but the imputed corruption and criminality of the Sitting Member, that is in question. Where there is no scrutiny, all that is requisite, is to

(1) *Ante*, p. 210, 211.

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prove the return. Having done this, the next best evidence of the facts charged, will be, to shew that the Sitting Member promised to reward the voter, that he treated him as a voter, and that he took him to the poll, and that the man polled. Will not evidence of these facts amount to a conclusive admission between the voter and the Sitting Member that the former had a right, or claimed to have a right to vote?

Mr. Austin.—It may be admitted that in some cases of mere informalities in the election, the production of the poll-books is not necessary in the trial of an Irish election petition. The production of the return and the indorsement, under the 60 Geo. III. and 1 Geo. IV. c. 11, s. 4, supersede the necessity of producing them, in certain cases, but in England, it is still necessary to produce them in all cases. If the qualification of an Irish member was in dispute, it might not be necessary to produce them, but it would certainly be otherwise in an English case. But here it must be proved that the other either voted, or claimed to have a right to vote, and these facts must be proved in the ordinary way. What is the pre-appointed evidence that should be given? Where is the certificate? Is it lost? Where is the affidavit? Why are you unable to produce it? Have you the poll-books? To prove that a voter polled is not by asking him, but by shewing the entry of his name in the poll-books? Will admissions be sufficient? Though a Sitting Member has voted in the House, though he has been in every division, though he has been sworn at the table, though numerous other acts have been done by him, yet are any of them treated as admissions? If you are to prove who is the Sitting Member, it must be done in the ordinary way. So here the fact of a party alleged to be bribed, being a voter, or claiming to vote, must be proved by the proper evidence. Would it be safe to take the

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admission of a person who has been bribed ? There is no case in which such a proceeding as this was ever attempted.

The *Committee resolved*.—That they require the production of the poll-books, as evidence of the witness, John McCullagh having voted before his examination is proceeded with.

Mr. *Thesiger* applied to the Committee to adjourn, in order to enable the returning officer to be called ; the returning officer when he delivered the poll-book to the clerk of the peace, for safe custody, ought to have made and to have delivered, at the same time, an affidavit verifying them. The poll-books are here, but there is no affidavit. It is therefore necessary, that the returning officer shall be called before the books can be used, unless the other side consent to their being referred to. *Londonderry case*, (1) *Shrewsbury case*, (2) *Galway case*. (3) When the clerk of the peace was summoned, it was presumed, that he possessed all the proper documents, and that it would not be necessary to tell the returning officer.

Mr. *Austin*.—There has been no sufficient reason given for the indulgence that is asked. It was the duty of the petitioners to have had the poll-books examined, and to have ascertained if the affidavit had been delivered with them. In the *Londonderry case*, the mistake was not one of which the parties could be cognizant ; in the *Shrewsbury case*, time was given because there was another part of the case that could be proceeded with ; in the *Galway case* the sheriff had absconded. The principle is, that the parties are not to be put to delay and expence, in order to collect evidence that might have been prepared before the case was opened ; there has been gross negligence, and no excuse has been offered for the omission to summon the returning officer. In the *Portarlington*

(1) P. & K. 275.

(2) Minutes.

(3) Minute, 1836.

case, (1) an application for an adjournment was made on the ground, that witnesses necessary to prove the poll had not arrived, in consequence of a belief that the case was to go over the Easter holidays, but the delay was not permitted.

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It was resolved unanimously to grant the delay asked, and the Committee agreed to adjourn, and to determine, at their next sitting, the conditions which they should impose upon the petitioner.

At the next meeting of the Committee, (Tuesday, May 8,) Mr. *Joy* applied to have the costs that the Sitting Member would incur by the adjournment, paid by the petitioners. It might easily have been ascertained if the evidence that was to be offered was complete or not. If an application of this kind was to be a matter of course, no Irish case would ever be properly prepared for trial. In the *Youghal case* (2) of this session, costs were given against the party asking for the delay, though the arrival of the witnesses was prevented by the severity of the weather. In the *Portarlington case*, (3) the petitioners offered to pay all the expenses of the delay.

Mr. *Thesiger*.—In the *Portarlington case* there was gross negligence committed, and the petitioners offered to purchase the indulgence they required upon the payment of costs. They were in default, and had no claim to delay. In the *Youghal case* costs were offered, and the petitioners consented to receive them. But what is the position of the petitioners in this case? Without any omission, having brought the poll-books here, they found, upon their being opened, that the returning officer had neglected to perform his duty, and to make the affidavit

(1) P. & K. 239. See the cases collected in a note to that case, in which applications for an adjournment had been made.

(2) *Supra*, p. 389.

(3) P. & K. 249.

1838. required of him by the statute. All the hardship that is complained of may be avoided by the other side. There is no reason to presume that the poll-books have been improperly dealt with, and the case may proceed, if they are admitted in evidence without the affidavit.

It was resolved.—"That the petitioners shall pay the costs of the Sitting Members, agents, and witnesses now in London, during the delay that will take place previously to the arrival of witnesses from Ireland to establish the authenticity of the poll-books."

The Committee then examined the agents of the Sitting Member upon oath, and required them to deliver at once a list of the names of the agents and witnesses whom they had in attendance. An objection was made to the names of the witnesses being disclosed, and they were, therefore, written out and delivered to the Chairman, the counsel for the petitioners not being permitted to see the list. Some of the witnesses, whose names were delivered in, and whose expenses were allowed, under the resolution of the Committee, had attended in London upon personal request, and no summons had been issued to them.

Mr. *Thesiger* applied to the Committee to adjourn until Monday, May the 14th.

The room was cleared, and in the evening the Chairman reported to the House the following resolutions, which had been unanimously agreed to by the Committee :—

"That it appeared to the Committee, that *Richard Cooke*, (1) a witness under examination before them, had been served with the Speaker's warrant to produce certain documents (2) specified therein, but that by some error on his part, he had omitted to bring the same with

(1) The clerk of the peace of the City of Waterford.

(2) The affidavits of registry.

him, and they are still remaining in his office at Waterford.

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“That it also appeared to the Committee, that the sheriff had omitted to execute the affidavits required by the Act of Parliament, 1 Geo. IV. c. 11, s. 3, and that the witnesses necessary to prove the poll-books had not arrived.

“That it appeared to the Committee, that the production of these witnesses and documents was essentially necessary for the purposes of justice; but that it will be admissible to adjourn the sittings of the Committee until Monday the 14th day of May instant, to give time for the arrival of the witnesses and documents in question.”

The Committee met the next day, and the Chairman reported that he had obtained the leave of the House to adjourn until the 14th of May.

Upon the re-assembling the Committee, one of the two sheriffs of Waterford, who had the charge of the poll-books during the election, and who delivered them into the custody of the clerk of the peace, was called. It appeared that he had made the usual affidavit, but had retained possession of it, believing that he was entitled to keep it for his own security.

Upon the evidence of this witness, the poll-books were admitted without argument.

The petitioners then proceeded to offer evidence of three cases of alleged bribery by Mr. Barron, but finally abandoned them without calling for any decision from the Committee.(1) After the petitioners had closed the first case, and a witness in the second case, of the name of Serle, was called into the room, Mr. *Austin* requested that a witness who had previously been examined might be recalled. Dur-

(1) Part of the case abandoned was a charge of bribery by the payment, during the progress of the election, of the municipal rates due by certain voters in the interest of Mr. Barron.

1838. ing the re-examination of this witness, upon a matter in no way connected with the second case, Serle remained in the room. The Committee allowed an objection to the examination of Serle, though his continuance in the room had been through inadvertence.

The Committee reported that Henry Winston Barron, Esq., was duly elected a citizen to serve in this present Parliament for the city of Waterford, and that neither the petition, nor the opposition to it, were frivolous or vexatious.

CASE XXIII.

NEWRY.

The Committee was appointed on the 20th of March, 1838, and consisted of the following Members :—

Sir John Buller Yarde Buller, Bart. (Chairman), <i>Devonshire.</i>	
Lord Teignmouth,	William Taylor Copeland, Esq.
<i>Mary-le-bone.</i>	<i>Stoke-upon-Trent.</i>
John Henry Vivian, Esq.	Christopher Rice Mansell Talbot, Esq.
<i>Swansea.</i>	<i>Glamorganshire.</i>
Thomas Dyke Acland, Esq.	Lord Viscount Barrington,
<i>Somersetshire, W.</i>	<i>Berkshire.</i>
Sir G. Thomas Staunton,	Sir Charles Lemon, Bart.
<i>Portsmouth.</i>	<i>Cornwall, W.</i>
Joseph Bailey, Esq.	Hon. Sidney Herbert,
<i>Worcester.</i>	<i>Wiltshire, S.</i>
Petitioners—Electors in the interest of D. C. Brady, Esq.	
Counsel for the Petitioners—	
Mr. Serjeant Merewether, Q. S., Mr. Austin, and Mr. O'Hagan.	
Agent for the Petitioners—Mr. Bryden.	
Sitting Member—John Ellis, Esq.	
Counsel for the Sitting Member—	
Mr. Thesiger, Q. C., Hon. Mr. Talbot, and Mr. De Salis.	
Agent for the Sitting Member—Mr. R. Green.	

Mr. Glenny, the son of the seneschal and returning officer of Newry, at the last election, was called and stated, that he held the poll-books, and was ready to produce them. His father had been unable to reach London in consequence of severe indisposition. A surgical operation had been performed upon him at Dublin, when on his way to London, and medical certificates were offered of his incapacity to attend the Committee. He sealed up the poll-

1838. books and delivered them to his son, who declared that they were in the same state as they were when he received them.

Mr. *Thesiger* objected to the reception of the poll-books, there was not sufficient evidence given to authenticate them. In the absence of the returning officer, their verification is regulated by statute 1 Geo. IV. c. 11, s. 3, and 4 Geo. IV. c. 55, s. 76, *Monmouth case*, (1) *Oxford case*, (2) *Roscommon case*. (3)

Mr. Serjt. *Merewether* submitted that under these circumstances, the evidence produced was the best that could be obtained. The non-attendance of the returning officer could not be prevented. He was on his way to produce the poll-books himself, when he was seized with an illness which rendered it impossible for him to continue his journey. The poll-books are not wanted for the purpose of a scrutiny, but merely to prove the election.

It was resolved, that the authenticity of the poll-books, is not, at present, sufficiently proved to admit of their being received in evidence.

Mr. Serjt. *Merewether* stated, that he had made inquiries respecting the state of health of the returning officer, and the possibility of his attendance. He found that there was no reason to suppose that he would be able for some time to remove from Dublin. He had a right to apply for time to enable him to send for the poll-clerks to prove the poll-books, but, in consequence of the delay and expence that would attend such a proceeding, he should refrain from making the application.

The *Committee resolved*, that John Ellis, Esq., was duly elected, and that neither the petition nor the opposition to it were frivolous or vexatious.

(1) K. & O. 410. (2) P. & K. 96, 101. (3) K. & O. 259, 260.

CASE XXIV.

GALWAY.

This Committee was appointed upon May the 22nd, 1838; and consisted of the following Members:—

The Right Hon. Lord Morpeth (Chairman), <i>Yorkshire.</i>	
Hon. W. Howard,	H. J. Winnington, Esq.
<i>Sutherlandshire.</i>	<i>Bewdley.</i>
Lt.-Col. George Ralph Abercromby,	T. N. Redington, Esq.
<i>Stirlingshire.</i>	<i>Dundalk.</i>
Sir Charles Brooke Vere, K. C. B.	Francis Aglionby, Esq.
<i>Suffolk, E.</i>	<i>Cumberland, E.</i>
H. Meynell, Esq.	David Callaghan, Esq.
<i>Lisburne.</i>	<i>Cork.</i>
William Bolling, Esq.	G. B. Mathew, Esq.
<i>Bolton.</i>	<i>Shaftesbury.</i>

Petitioners—

Electors in the interest of Sir Valentine Blake, Bart.
 Counsel for the Petitioners—Mr. Thesiger, Q. C., Mr. O'Hanlan,
 Agent for the Petitioners—Mr. Baker.
 Sitting Member—Andrew Henry Lynch, Esq.
 Counsel for the Sitting Member—
 Mr. James Campbell, Mr. Austin, and Mr. Fleming.
 Agent for the Sitting Member—Mr. Burford.

Mr. *Thesiger* opened the case for the petitioners. A new writ issued for the town of Galway, upon the 1st of February, in consequence of Mr. Lynch having accepted the office of Master in Chancery. The patent, however, of his appointment was dated the 6th of February, or five days after the writ issued. The election took place upon the 12th; and terminated upon the 16th of February, the state of the poll, at its close, being, for Mr. Lynch, 445,

The office of Master in Chancery, regulated by the 3 & 4 Wm. IV. c. 94, and the appointment to it vested in the Crown, not an office disqualifying the holder to sit in parliament.

1838. and for Sir V. Blake, 159. Mr. Lynch was, therefore, returned, and the questions for consideration are, whether or not Mr. Lynch was disqualified to be re-elected by accepting the office of a Master in Chancery, and whether the notice, which it will be proved was served upon the electors, of the disqualification of Mr. Lynch, renders the votes given for him null and void, and thus entitles Sir V. Blake to the seat.

The cases upon the effect of notice of disqualification are collected in *Rogers on Elections* (1); *Rex. v. Hawkins* (2); *Rex. v. Monday* (3); and the cases therein cited. *Claridge v. Evelyn* (4); *Fife case* (5); *Leominster case* (6); *Drogheda* (7); *Cork County* (8); *Belfast case* (9); *Male on Elections* (10); 1 *Roe on Elections*. (11) It is impossible to contest the principle of the nullity of votes given in favor of a candidate who is disqualified to be returned, especially if notice of the disqualification is given. In some cases it may act harshly, but this a committee cannot judicially regard.

The more important question, however, is whether or not the office of a Master in Chancery, regulated by the 3 & 4 Wm. IV. c. 94, ss. 16, 39, is an office within the disqualifying clauses of 6 Anne, c. 7. The officers of the Court of Chancery known as Masters, were the assistants of the Lord Chancellor or Lord Keeper and of the Master of the Rolls (12), and they were anciently members of the King's Court; they sit when necessary with the Chancellor and the Master of the Rolls in open Court, and they have referred to them, in their own offices, interlocutory orders

(1) Page 209.

(2) 10 East, 211; 2 Dowl. 124.

(3) Cowp. 537.

(4) 5 B. & Ad. 81.

(5) 1 Luders, 455.

(6) Corb. & D. 1.

(7) K. & O. 213.

(8) K. & O. 391.

(9) *Infra*.

(10) Page 55, 171.

(11) Page 255.

(12) Harrison's Chancery Practice, 24.

upon matters to be inquired into in the progress of a suit. Their judicial duties are of a highly important character.

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At an early period judges were excluded from the House of Commons. They, as well as the Attorney and Solicitor General and the Masters in Chancery had writs directed to them to attend the House of Lords, and it was long thought that all these persons were ineligible to sit in the House of Commons. Before the Revolution there were several resolutions passed against the sitting of the Attorney General(1). About that time Sir Heneage Finch took his seat when Attorney General, and no objection to the sitting of the Attorney General has since been made. The Solicitor General has always been permitted to sit, Masters in Chancery were not ineligible, and the Master of the Rolls may still be elected and sit. In point of principle no objection can be raised at this time against the eligibility of Masters in Chancery. The present question arises under the 3 & 4 Wm. IV. c. 94. Until this act passed Masters in Chancery were appointed by the Lord Chancellor, and if in parliament, this appointment did not vacate their seats. Under the 5 Geo. III. c. 28, they each received a salary of 200*l.* a-year, and under the 46 Geo III. c. 128, an additional salary of 400*l.* a-year. The 3 & 4. Wm. IV. c. 94, vests their appointment "in his Majesty, his heirs and successors," and directs that it shall be made by letters patent under the great seal of Great Britain. It also fixes their salary at 2500*l.* a-year each. For the first time in 1833 the nomination and appointment of the Masters were vested in the crown.

(1) *Journals*, April 8 and 11, 1614.—The following questions were put: 1. Whether he (the Attorney General) shall, for this parliament, remain in the House, or not? *Resolved*, He shall. 2. Whether any Attorney General shall, after this parliament, serve as a member of this House? *Resolved*, No.

Journals, 1 Ch. 1, Feb. 10, 1625.—"A new writ for the choice of another burgess for the borough of East Grinstead, in the room of Sir Robert Heath, His Majesty's Attorney General, according to the precedent of the 12 *Jacobi*."

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The offices became new offices under the Crown. Now the 6 Anne, c. 7, s. 25, declares, "that no person who shall have, in his own name, or in the name of any person or persons in trust for him, or for his benefit, any new office, or place of profit whatsoever under the Crown, which at any time since the 25th day of October, 1705, have been created or erected, or shall hereafter be created or erected, nor any person who shall be a commissioner or sub-commissioner of prizes, [secretary, or receiver of prizes, nor any comptroller of the accounts of the army, nor any commissioner of transports, nor any commissioner of the sick and wounded, nor any agent for any regiment, nor any commissioner for any wine houses, nor any governor, or deputy governor of any of the plantations, nor any commissioner of the navy employed in any of the out ports, nor any person having any pension from the Crown during pleasure,] (1) shall be capable of being elected, or of sitting or voting as a member of the House of Commons in any parliament which shall be hereafter summoned and holden." Previously to this act being passed, which disqualifies the holders of new offices erected or created since 1705, many attempts had been made to disqualify office-holders from sitting in the House of Commons, 5 & 6 Wm. & M. c. 7; 11 & 12 Wm. III. c. 2; 12 & 13 Wm. III. c. 10. But the chief disqualifying statute was the act of settlement of the 12 & 13 Wm. III. c. 2, s. 3, which enacted, "that no person who has an office or place of profit under the King, or receives a pension from the Crown, shall be capable of serving as a Member of the House of Commons." The operation of this enactment being found to be very prejudicial to the public service it was repealed by the enactment of the 4 Anne, c. 8, s. 25, which is the same as

(1) The words within the brackets were added in the conference with the Lords in 1705.—*Journals of the House of Commons*, vol. xv. p. 159.

that of the 6 Anne, c. 7, s. 25. But when the repeal of it took place considerable debate and discussion occurred between the two Houses. The Lords proposed an almost total abolition of the existing disqualifications, and the Commons insisted upon making numerous exceptions. Among the reasons given by the Commons in a conference, in support of the restrictions they were desirous to make, were the following :—

1. "Because they cannot consent to repeal a clause which was made to redress a grievance so frequently complained of in Parliament; and your Lordships, by your amendment, though it excludes only persons from sitting in the House of Commons that shall have new offices, or places of profit under the Crown, hereafter to be created, and the commissioners, sub-commissioners, and receivers of prizes, do admit some provision of that nature to be reasonable."

2. "Because a total repeal of the said clause would admit such an unlimited number of officers to be members of the House of Commons as may destroy the free and impartial proceedings of Parliament, and endanger the liberties of the Commons of England."

The result was the passing of the 6 Anne, c. 7, s. 25, which made the year 1705 the dividing time between new and old offices. New offices were those that should be "created or erected" after October 25, 1705. The first expression "created" can produce no difficulty, and Dr. Johnson explains it "to cause to exist." The word "erected" is not so common in use as "created," but the same authority explains it to mean "to establish anew, to settle." Thus, if a place of profit existed before 1705, to which fees and perquisites were attached, and after 1705 it is regulated, a new salary attached to it, and the appointment to it given to the Crown, it would be established anew, settled, or erected. Such is the case with the office in question. Until 1833 it was not an office under the

1838. Crown. It was then, for the first time, vested in the Crown, and a salary of 2,500*l.* a-year attached to it. It is, therefore, a new office of profit, within the 6 Anne. But to disqualify the holder of it, it is not necessary that it should be a new office, it is sufficient if it is a place of profit erected under the Crown since 1705. There are some acts of parliament which throw much light upon this distinction. The 57 Geo. III. c. 64, s. 15, provides, that the regulation of any office in Scotland, regulated by that act, "which was an office existing previous to the 6 Anne, shall not be held to be a new office." This is a legislative exposition of the word "erected." Without this provision, the old offices, newly regulated, would have been settled anew, and would have become places of profit erected since 1705. The 57 Geo. III. c. 84, s. 5, also enacts, that every office or appointment belonging to, and making part of, the establishment of any of the offices mentioned in the act, "when so regulated as aforesaid, shall be taken to be a new office within the true intent and meaning" of the 6 Anne. This provision shows, that the regulation of them brought them within the disqualification of the statute of Anne. It is true that the 26th section of the 6 Anne provides, that if any person being chosen a member of the House of Commons shall accept an office of profit from the Crown, his seat shall be declared void, and that he may be re-elected. But this proviso relates to old offices, for otherwise the act would declare, that certain offices shall disqualify, and that upon the acceptance of a disqualifying office, a party may sit and vote. Yet to the present case, the proviso can have no application. The writ was issued on February 1st, when the vacancy took place, and the office was not granted until February the 6th. The vacancy took place before the grant of the office.

It will, perhaps, be contended that the 15 Geo II.

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c. 22, s. 3, which provides that nothing in that act shall extend, or be construed to extend, to exclude from the House of Commons any person having or holding any office, or employment for life, or for so long as he shall behave himself well in his office, applies to this case. But this act does not interfere with the restrictions connected with new offices, or places of profit, erected since 1705. The 33 Geo. III. c. 41 (I. A.), also, disqualifying certain public officers from sitting in the House of Commons in Ireland, excepts by (s. 8) persons having or accepting an office for life, or during good behaviour, but it applies to Irish and not to English offices. All doubts, however, are removed by the 41 Geo. III. c. 52, s. 3, which enacts, that persons disabled, by any act of parliament of Great Britain, from sitting for any place in Great Britain, shall be disabled from sitting for any place in Ireland. The 8th section provides, as the 15 Geo. II. c. 22 does, that the act shall not exclude from the House of Commons any person having or holding any office or place of employment for life, but this provision does not interfere with the disabilities arising from acceptance of a place of profit in England under the Crown, erected since 1705. The question is, would Mr. Lynch have been qualified to be elected for a borough in England? If under the 6 Anne he would be disqualified to be elected in England, under the 41 Geo. III. c. 52, he is disqualified to be elected in Ireland. Parliament has at all times been anxious to diminish the influence in the House of Commons of the patronage of the Crown. "However," says Mr. Hatsell (1), "men may flatter themselves that their parliamentary conduct is regulated only by the principles of honour, and a regard for the public service; we learn from the histories of all ages, and of all countries, as well

(1) 2 Hatsell's Preced. 63.

1838. as of our own, that the respect which is paid by the multitude to those who are attending about the person of the prince—that titles of rank—that badges of different coloured ribands—but, above all, that a considerable pecuniary addition to their income, are motives which always have had a certain weight, and will continue to operate on the minds of men, even of the highest rank, and of the most independent fortunes.” And to these remarks may be added the high authority of Mr. Hallam. “If,” says Mr. Hallam (1), “the chief ministers of the Crown are indispensably to be present in one or other House of Parliament, it by no means follows, that the doors should be thrown open to all those subaltern retainers who, too low to have had any participation in the measures of the government, come merely to earn their salaries by a sure and silent vote. Unless some limitation could be put on the number of such officers, they might become the majority of every Parliament, especially if its duration were indefinite, or very long.” And speaking of this very statute of the 6 Anne, this same writer observes, that its “restrictions ought to be rigorously and zealously maintained, and to receive a construction in doubtful cases according to their constitutional spirit, not as if they were of a penal nature towards individuals, an absurdity in which the careless and indulgent temper of modern times might sometimes acquiesce.”

The poll-books were duly proved. Mr. Jackson, of the Crown Office, produced the writ of election, dated February 6, 1838. The minute-book of the Crown Office contained the entry of the swearing in of Mr. Lynch, upon February 27. The patent of appointment recited that “by an act passed in the fourth year of the reign of

(1) Vol. iii, p. 259, 261.

our late uncle, King William IV., entitled an act, &c., the appointment of the office of Master in Chancery, was vested in us, our heirs and successors, &c." The clerk of Mr. Lynch was examined respecting the performance of the duties of the office, the transfer of the business in the office of the last Master to Mr. Lynch, and the receipt and collection of office fees. Evidence was also given of the service of notice of the alleged disqualification upon all voters upon their coming up to the poll.(1)

Mr. *O'Hanlan* was heard upon the evidence.

Mr. *Austin*.—There is no question that until the 2 & 3 Wm. IV., c. 94, a Master in Chancery might be elected and sit in Parliament. The policy or impolicy of the practice is immaterial. The Master of the Rolls, and other judges may still be elected, and may sit in the House of Commons.

This office is not, however, a new office, or place of profit under the Crown, and if it is a new office, or place of profit under the Crown, it is a new office or place of profit held during good behaviour, the acceptance of which does not disqualify the holder from sitting in the House of Commons. In all cases respecting eligibility, eligibility is to be aided, and ineligibility ought to be strictly proved. Severe penalties are imposed by the acts of parliament creating disqualification, and they are not favoured. It is not through deduction or inference, but by conclusive proof, that it should be shewn, that the 3 & 4 Wm. IV. c. 94, disqualifies the Masters in Chancery. By the 16th section, they are directed to be appointed under the great seal; it is not said, that they shall not sit in Parliament, nor is there the slightest hint importing ineligibility. The 3 & 4 Wm. IV. c. 94, is entitled an act for the regulation of the

(1) An entry in the printed Journals, that Mr. Lynch "had accepted the office of Master of the High Court of Chancery," was read by consent.

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proceedings and practice of certain offices of the High Court of Chancery. The 57 Geo. III. c. 62, has a similar title, and was passed to abolish certain offices, and to regulate certain other offices in Ireland. By the 10th section, it is declared, that the offices regulated, shall be deemed new offices; and without this special provision they would not have disqualified the holders of them. What indeed, has the legislature done when the regulation of an old existing office is to be attended with ineligibility to a seat in Parliament? It has not been left to inference. A distinct substantive disqualifying provision has always been made whenever disqualification has been intended. The 3 & 4 Wm. IV. c. 94, contains no analogous provision to this of the 57 Geo. III. c. 62, s. 10. In the 57 Geo. III. c. 63, it is also declared, that the offices mentioned, when regulated, shall be deemed new offices, The 57 Geo. III. c. 64, provides, that certain offices existing previous to 1705, shall not be deemed new offices, on account of their being regulated, merely because these officers were within the appointment of the treasury, and it was advisable to state, that though treasury officers, they should not be disqualified. The 57 Geo. III. c. 84, s. 5, provides, that the regulated offices shall be deemed to be new offices. Without this section, those who held them, might have sat in Parliament. These acts establish the proposition, that where there is no intention expressed in an act of parliament, regulating an old office, to disqualify the holder of it, no disqualification arises.

But this is not a new office within the 6 Anne, c. 7, s. 25. It has been argued that the words, "new office, or place of profit," are to be read disjunctively—that the office must be new, but that the place of profit need not be new. If this were so, a new office, such as that of secretary to the late king, held by Sir W. Knighton, though without salary or profit, would have disqualified. "New office or

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place of profit," are merely synonymous, meaning "new office, or new place of profit." But then a peculiar meaning is given to the word "erected," and it is said, that as the place of profit need not be new, this conclusion follows;—a place of profit formerly not under the Crown, but newly put under the Crown, becomes "settled or established anew," and is, therefore "erected," by being put under the Crown, and disqualifies the holder under the statute of Anne. But, in order that the office should be established anew, it should be shown that the office was abolished, or suspended, and then re-established. The 33 Geo. III. c. 41, s. 2, (I. A.) enacts, that if any office under the crown, abolished, or disused for the space of five years, before the passing of the act shall be re-established, it shall be deemed a new office; that is, the office would be revived and erected. The common words in the grant of a charter, are "*creamus et erigimus*." But they are words of creation, and denote novelty, newness, origin; to create and to erect being synonymous. The mischief to be guarded against by the statute of Anne was not of existing or of old offices, but of future offices that might be called into existence, through the patronage of which Members of Parliament might be corrupted. The reasons given in the conferences of 1705, clearly shew this to have been its intention. In the sixth reason, (1) the Lords say, that their amendment "secures the kingdom against

(1) The reasons assigned were numerous. The more important are as follows:—The Lords insist upon the second and third amendments made by them to the clause marked B. which relate to the repealing the clause in the act intitled "An act for the further limitation of the Crown, and the better preserving the rights and interests of the subject," whereby persons having offices or places of profit, or pensions from the Crown are made incapable of serving as members of the House of Commons:—

First, because they conceive that the said general disabling clause ought to be repealed, as inconsistent with the nature and constitution of the English government; for to enact, that all persons employed and trusted by the Crown, shall for that reason alone, become incapable of being trusted by the people is in effect to declare, that the interests of the Crown and of the people must be

1838. future excesses, in multiplying offices not necessary for the interest of the government, by disabling all who shall

always contrary to each other, which is a notion no good Englishman ought to entertain.

Secondly, They think such a clause is manifestly injurious to the people of England, who are the proper judges of what persons are fit to represent them in the House of Commons; and, therefore, a clause, which, in so great a measure, deprives the electors of their freedom in choosing, seems to be built upon a supposition that the people are become either so corrupt, or so insensible, that they ought no longer to be trusted in the same manner as they have hitherto been, with the choice of their own representatives; and may often deprive them of the service and assistance of the most valuable men in the kingdom, for that will always be the case when the Crown makes a right choice in filling offices with gentlemen of interest, probity and understanding.

Thirdly, The Lords apprehend that the excluding officers from sitting in the House of Commons may tend to increase the number of pensions there, which they think, would be infinitely of more dangerous consequence.

Fourthly, The act made in the last reign for the frequent meeting and calling of parliaments was intended, and seems to be, an effectual security against any real prejudice to the people by introducing an excessive number of officers into the House of Commons; for the nation, having such frequent opportunities of new elections, may help themselves at pleasure, by lessening the number of officers, or totally forbearing to choose any of them, and this they certainly will not fail to do as soon as they find them to be a grievance.

Fifthly, The government has subsisted happily, for many hundred years without any disabling law of this nature, and the Lords have observed, that the clamorous discourses spread about in relation to the great number of officers sitting in parliament have been chiefly since the late happy Revolution; and yet within the compass of that time more excellent laws have been made for declaring and securing the rights and liberties of the people and the freedom of parliaments than in the course of some ages before, which does demonstrate, that there has been hitherto no mischief from persons in office, and gives the Lords cause to think that such clamours, though they may have created some prejudice in the minds of well-intentioned persons, yet took their rise from ill-designing men, who observed with regret, the active zeal with which those, who were in employments under the Crown, supported the present establishment and pursued the common interest of the prince and the people.

Sixthly, The amendment made by the Lords to the clause B., secures the kingdom against future excesses in multiplying offices (not necessary for the interest of the government) upon any indirect account, by disabling all, who shall hereafter come into any new created or erected offices, from being elected, or from sitting or voting as members of the House of Commons. The Lords have, also, by the same amendment disabled all officers, relating to the prizes, from sitting in the House of Commons, according to the intent of a bill which, for that purpose, was sent up to the Lords by the late House of Commons.

Seventhly, The Commons in the clause B., admit it to be reasonable, that

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hereafter come into new created, or erected offices." The object of both Houses was to check the multiplication of new offices, and not to interfere with those that existed. Is this an office newly erected? It was in existence long before the statute of Anne. The 3 & 4 Wm. IV. c. 94, merely directs that the appointment shall be made directly from the Crown by letters patent. It did not by this enactment become a new office, or a new place of profit. The old duties, the old jurisdiction connected with it, were to remain as before. There is no distinction or difference to be found in the duties, the rights, or the functions of Mr. Lynch, distinguishing his appointment or office, from those of other Masters previously appointed by the Lord Chancellor. One alteration has taken place—the salary and fees of each Master amounted to above 4,000*l.* a-year, and they are now by this act reduced to a fixed salary of 2,500*l.* a-year. If this makes a Mastership in Chancery a new office, it became a new office when the 5 Geo. III. c. 28, granted to it a salary of 200*l.* a-year; and again, when the 46 Geo. III. c. 128, added 400*l.* a-year more. If the regulation of the salary makes it a place of profit erected under the Crown, it had become so upon both these occasions. But this was always an office "under the Crown." The seat is vacated, because it is accepted "from the Crown." The 26th section of the 6 Anne, c. 7, applies to old offices of profit, and directs that if any person shall accept such an office "from the Crown," he shall vacate his seat and may be re-elected. The 25th section applies to new offices "under the Crown," and dis-

the general disabling clause should be regulated and altered; and the Lords are of opinion that there can be no safe and just way of making such alteration, but by naming expressly, and in certain and plain words, what officers ought to stand excluded from the House of Commons, and to repeal the general clause as to all others; and, therefore, the form of the next amendment of the Lords (from which they cannot depart) makes it necessary for them to insist upon the word "repeal," and not to admit that the words "regulated and altered," should stand, as being wholly improper with respect to the Lords' next amendment."

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qualifies the holders of them. Now, *the office Mr. Lynch holds, is an old office under the Crown not within the 25th section*, but accepted by him "from the Crown." He therefore, vacated his seat in compliance with the 26th section, but was eligible to be re-elected. So long as the Masters accepted their offices from the Chancellor, they did not upon their appointment, if in Parliament, vacate their seats; they held their offices under the Crown, but they did not receive them from the Crown.

2. If the office of a Master in Chancery is an office erected under the 3 & 4 Wm. IV. c. 94, still being held during good behaviour, it does not disqualify. The act of settlement contemplated the exclusion of all persons from the House of Commons who held any office. The restriction it imposed was partially abolished by the 6 Anne, c. 7, s. 25, and was still further removed by the 15 Geo. II. c. 22, the 3rd section of which provides, that nothing in that act shall extend, or be construed to extend, or relate to, or exclude, certain public officers named, or to exclude any person having, or holding any office or employment for life, or for so long as he shall behave himself well in his office." And this section repealed the 25th section of the 6 Anne, so far as it extended to new offices held for life, or during good behaviour. This is more clearly shewn by the provisions of the 41 Geo. III. c. 52, which embodies the Irish Act of the 33 Geo. III. c. 41, (I. A.) s. 8. By the first section it enacts, "that all persons disabled from, or incapable of being elected, or sitting, or voting in the House of Commons of any Parliament of Great Britain, shall be disabled from being elected, or sitting in the House of Commons of the United Kingdom as representatives of any part of Great Britain. The second section, that persons disabled from being elected, or sitting in the House of Commons in Ireland, shall be disabled from being elected, or sitting in the House of Commons of the United Kingdom as the representatives

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of any part of Ireland." Then follows the 3rd section, which creates a cross-disability, providing, that nothing in the act shall enable persons disabled by an act of parliament of Great Britain, to sit in the House of Commons of the United Kingdom for any place in Ireland, or to enable persons disabled by any act of parliament of Ireland from sitting in the House of Commons of Ireland to sit in the House of Commons of the United Kingdom for any place in Great Britain. This section, therefore, includes in it the 6 Anne, c. 7, s. 25, and the 15 Geo. II. c. 22, relating to England, and the 33 Geo. III. c. 41, (I. A.) relating to Ireland. And the 8th section, which overrides the previous sections, removing the doubts which the previous state of the law might have created, provides, "that nothing in this act shall extend, or be construed to exclude any person having, or holding any office, place, or employment for life, or for so long as he shall behave himself well in his office, other than, &c., any thing herein contained to the contrary notwithstanding." This is a repetition of the 8th section of the 33 Geo. III. c. 41, (I. A.) and is made to apply equally to Great Britain as to Ireland. The 9th section then directs, that upon the acceptance of any office of profit immediately, or directly from the Crown of the United Kingdom, or by the nomination or appointment of the Lord Lieutenant of Ireland, the seat shall become vacant, and a writ shall issue for a new election, but that such person, if not incapacitated by any thing contained in the act, shall be capable of being re-elected. So, that, under the provisions of the statute of Anne, as incorporated in, explained, and modified by this act, Mr. Lynch is not disqualified.

It ought, also, to be observed, that this is an office nominated to by the Crown under an act of Parliament, and is not an office created by the Crown. The statute of Anne was directed against offices created by the Crown. The

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reasons of the Lords in 1705, did not relate to parliamentary offices, but to offices that might be multiplied by the Crown for corrupt purposes. Whenever it has been considered politic, that upon the regulation of an old office a parliamentary disqualification should be imposed, provision for that purpose has been made. Here no such provision exists, and it must have been felt that men conversant with the business of the Court of Chancery, with law, and with legal proceedings, and appointed for life, were not unfitted to sit in Parliament.

It was resolved.—That Andrew Henry Lynch, Esq., was duly elected, and that neither the petition nor the opposition to it, were frivolous or vexatious. (1)

(1) The following case of disqualification occurred in the Session of 1839, *Southwark*.—On the 15th February 1839, Mr. Wynn moved for a new writ for the borough of Southwark, on the ground that Mr. D. W. Harvey, had vacated his seat by the acceptance of the office of Registrar of Hackney Carriages, created by 1 & 2 Vict. c. 79, s. 4.

Mr. D. W. Harvey, after stating to the House that he had resigned the office and had refused the salary, withdrew whilst the discussion respecting his seat was carried on.

The Attorney General, was of opinion that the office was a disqualifying one, and that the refusal of the salary made no difference in the case. He moved for the appointment of a select Committee, to inquire and report whether Mr. Harvey, by the acceptance of the office, had vacated his seat. The motion of the Attorney General was acceded to, and a Committee was appointed, consisting of the following Members:—Mr. Attorney General, Mr. Wynn, Sir F. Pollock, Mr. Solicitor General, Lord Stanley, Mr. Serjt. Wilde, Sir J. Graham, Mr. Jervis, Mr. Cresswell, Mr. Sanford, Sir T. Acland, Mr. Aglionby, Mr. Goulburn, Mr. Ward, and Mr. Pusey.

On the 21st February, 1839, the Resolutions of this Committee were reported to the House as follow:—

1. That, having considered the statutes 6 Anne, c. 7, 41 Geo. III. c. 53, and 1 & 2 Vict. c. 79, your Committee is of opinion, that the office of Registrar of Metropolitan Public Carriages is a new office of profit under the Crown, within the true intent and meaning of the first of the above mentioned statutes.

2. That your Committee is of opinion that Mr. Harvey has accepted the said office and has thereby vacated his seat. (a)

These Resolutions were agreed to, and a new writ issued.

(a) The following case has the authority of Mr. Speaker Onslow: "When Mr. Edward Walpole was made Clerk of the Pells, he continued to sit, as being appointed, not by the Crown, but by the Treasurer of the Exchequer: and this case was well considered at the time. Mr. O."—2 *Hatsell*, p. 44.

CASE XXV.

BELFAST.

This Committee was appointed on the 30th of January, 1838, and consisted of the following Members :—

Henry Halford, Esq. (Chairman), <i>Leicestershire, S.</i>	
Lancelot Rolleston, Esq. <i>Nottinghamshire.</i>	Horace St. Paul, Esq. <i>Worcestershire.</i>
Hart Logan, Esq. <i>Suffolk, W.</i>	W. L. W. Chute, Esq. <i>Norfolk.</i>
P. W. Miles, Esq. <i>Bristol.</i>	Viscount Grimston, <i>Hertfordshire.</i>
W. Bulkeley Hughes, Esq. <i>Carnarvon.</i>	Lord Alfred Henry Paget, <i>Lichfield.</i>
Viscount Villiers, <i>Weymouth.</i>	Richard Jefferson Eaton, Esq. <i>Cambridgeshire.</i>

Petitioners—

Electors in the interest of E. Tennant, Esq. and E. Dunbar, Esq.

Counsel for the Petitioners—

Mr. Thesiger, Q. C., Mr. Austin, and Mr. Whitesides, (*Dublin*).

Agent for the Petitioners—Mr. Bate.

Sitting Members—Earl of Belfast and James Gibson, Esq.

Counsel for the Earl of Belfast—

Mr. D. Pollock, Q. C. and Mr. Fisher Murray.

Agents for the Earl of Belfast—Messrs. Wallace, Clayton, and Cookson.

Counsel for J. Gibson, Esq.—

Mr. Harrison, Q. C., and Mr. Biggs Andrews, Q. C.

Agents for J. Gibson, Esq.—Messrs. Montgomery, Clayton, and Cookson.

The petition against the return, alleged that James Gibson, Esq. was not duly qualified by estate to be returned ; it also contained the usual charges respecting the disqualification of electors ; it alleged acts of bribery to

Immediately after the decision of *Mr. Harvey's case*, the case of Mr. Wynn was brought forward which was as follows :—

Montgomeryshire.—On the 25th of February, 1839, a Committee was appointed to inquire, whether the Right Hon. Charles Watkin Williams Wynn

1838. have been committed by Lord Belfast and Mr. Gibson and their agents, and stated that a commission to examine witnesses in Ireland would be applied for.

In the list exchanged by the Petitioners were several classes of voters who were objected to, as not duly registered for that at the time of registry as a householder, there was taken or subscribed a defective oath or affidavit, differing in substance from that prescribed by the act of the 2 & 3 Wm. IV. c. 88, inasmuch as by the affidavit it appeared that the registry was in respect of two distinct qualifications as a "warehouse" and "shop." In other cases it was objected that the registry was for "counting-house and warehouse"—"house and shop"—"dwel-

had, since his election, accepted from the Crown the office of Steward of the Lordship of Denbigh, and that they should report their opinion, whether Mr. Wynn had vacated his seat by his acceptance of the said office. It appeared, that Mr. Wynn had long held the office in question under letters-patent, which became void upon the demise of the Crown in 1837. On the 23rd of July, 1837, and before the election for the county of Montgomery, at which Mr. Wynn was returned, and which took place on the 1st of August, Mr. Wynn applied to the Chancellor of the Exchequer to be re-appointed. The correspondence that followed was not produced, but it appeared to have contained an assent to the request of Mr. Wynn and his acceptance of the new appointment. No instructions, however, were given to prepare the warrant authorizing the making out of the patent, until September or October, 1837, and the warrant was not prepared until February, 1838. The warrant directed to be forwarded to the Remembrancer's Office, was dated March 2, 1838, and when delivered on the 5th of March, 1838, was dated upon an erasure, July 18, 1837. The patent was sealed on the 6th of April, 1838. No special application was made to the Crown to assent to the nomination of Mr. Wynn.

The Committee resolved.—That the office of steward of the Lordship of Denbigh, was an office of profit from the Crown: That the Right Hon. C. W. W. Wynn, was appointed to the said office by her present Majesty: That the said office was not accepted by the Right Hon. C. W. W. Wynn from the Crown, since his election as a member of the present Parliament.

Tipperary case.—On the 15th of March, 1838, a petition was presented against the return of R. L. Sheil, Esq. for the county of Tipperary. The ground relied on in the petition was, that Mr. Sheil had become disqualified to sit in Parliament by the acceptance of the office of Commissioner of Greenwich Hospital. The recognizances were not entered into in respect of the petition, and the order for considering it was discharged on the 30th of March, 1838. Mr. Sheil resigned the office in March, 1839.

ling-house and warehouse"—"warehouse and counting-house." (1) 1838.

Before the case was opened, Mr. *Harrison* informed the Committee that notice had been given on the part of the Sitting Members, that an application would be made for a commission to examine witnesses in Ireland.

Mr. *Thesiger* opened the case.

The poll-books were produced by the clerk of the peace of the county of Antrim. He received with them the usual affidavit on August 6, the morning after the close of the poll. Finding that the affidavit had no date, he took it to Belfast and had the date, August 5, added by the magistrate, before whom it was sworn. This was done in the absence of the returning-officer. Affidavit.

Mr. *Harrison* objected to the reading of the affidavit, on the ground that if an affidavit is altered it ought to be re-sworn, and that it was merely stated in the alleged affidavit, that the deponent "now delivers to the clerk of the peace of the county of Antrim, the poll-books used at the present election." It ought to have followed the words of the act and to have stated that they are "the original poll-books." They ought to be the books upon which the return is founded. They may have been used at the election and yet the return may not be founded upon them.

Mr. *Thesiger*.—It may be admitted that if an affidavit is altered, it cannot be used until it is re-sworn. But the jurat, to which alone there has been any addition made, is not the affidavit—the jurat is not sworn to. The jurat

(1) These objections were occasioned by the decision of the judges in Ireland in *Sweetman's case* (Alcock's R. 97), by which a claimant was held not to be entitled to be registered in respect of a "counting-house and stores," the counting-house alone, not being of the value of 10*l*. The stores were under the counting-house and extended many feet under ground, beyond the area of the counting-house, and the entrance was by a trap-door from the counting-house.

1838. is written by the magistrate. If it had no date, it would have been a good affidavit. Shall it then be vitiated by the magistrate adding that which is immaterial? There is no form of the affidavit given in the act, and it is sufficient if the Committee has reason to believe that the books produced are the original books.

Mr. *Harrison* in reply. It is the jurat that gives this document authority as an affidavit, and makes the difference between its being treated as written, and not as parol testimony. By the 1 Geo. IV. c. 11, the poll-books are to be delivered up within twenty-one days. How does such an affidavit as this show that they were delivered up within the time? The affidavit, also, ought clearly to describe the books to which it relates.

It was resolved, that the objection to the affidavit be overruled.

Production of the poll-books of the borough of Belfast by the clerk of the peace of the county of Antrim, sufficient.

The witness was then examined respecting the custody of the records of the borough of Belfast. As clerk of the peace for the county of Antrim, he did not keep them.

Mr. *Andrews* objected that the witness was not the proper person to keep the poll-books, and that they were not produced out of the proper custody.

Mr. *Thesiger*.—Since the Reform Act, part of the county of Antrim has been included within the parliamentary limits of the borough of Belfast, and on this account the books are delivered to the clerk of the peace of the county. *Clonmell case*, (1) *Dungarvon case*, (2) *Ennis case*. (3)

Mr. *Harrison* in reply. It is not contended, that the poll-books may not be proved in another manner than is now attempted. The statute was passed to save expence, and if complied with, no objection to the proof of the poll-books could be made. The advantage which it gives can

(1) P. & K. 425.

(2) K. & O. 4.

(3) K. & O. 431. See *Sligo case*, ante, 566.

1838.

only be obtained in those cases in which its directions have been followed. In the *Clonmell case*, the books were verified by the party who produced them, to be in the state in which they were delivered into his custody. In the *Dungarvon case*, the returning-officer produced the poll-books, and stated that they had been in his custody ever since the election, and were in the same state as when he received them. Dungarvon was not a corporate town and the question in the present case did not arise, but the books were produced out of the custody of a person who was able to verify their authenticity, and to prove that from the time of the election until their production they had been safely kept. In the *Ennis case*, the poll-books were produced by the clerk of the peace of the county of Clare, but the deputy of the returning-officer was also called, who examined, and verified them. The evidence did not depend upon the custody. The production of the books of the clerk of the peace was not alone sufficient, and therefore, they were proved, as they ought to be in this case, as if the 1 Geo. IV. c. 11 did not exist. The part of the borough of Belfast, added by the Boundary Act, is in the county of Down.

It was resolved, that the objection to the poll-books was not sustained.

The state of the poll, at its close, was as follows :—

Mr. Gibson - - - 941

The Earl of Belfast - - 922

Mr. E. Tennant - - - 901

Mr. Dunbar - - - 869

Mr. *Harrison* stated, that it was proposed that evidence should first be given respecting the qualification of Mr. Gibson. It would shorten the case, if after this question was determined, he was allowed to attack the qualifications of Mr. Tennant and Mr. Dunbar, of which notice, under the resolutions of 1734 had been given. If these

Committee will not interfere with counsel in their conduct of the case.

1838.

parties should be found not to be qualified it would preclude the necessity of taking that part of the case which related to the seat, but would not prevent its being shown that the Sitting Members ought not to be returned, and that the election was void.

Mr. *Thesiger*.—It is for the counsel for the Petitioners to consent to the proposed arrangement and not for the Committee to require its adoption. *Galway case*, (1) *Inverness-shire case*, (2) *Carlow County*. (3) The rule is, that the Petitioners may put their case in what form they please, and to lay the whole of it at once before the Committee if they think proper. *Coventry case*, (4) *New Windsor case*. (5)

Mr. *Harrison*.—The consent of parties is not necessary. The application is not to divide the case so as to prejudice the Petitioners, but to pursue such a course as may shorten the labours of the Committee and terminate their sittings at the earliest moment. The Petitioners have no right to compel the Committee to enter into investigations that may turn out to be utterly useless.

It was resolved—that the Committee will not interfere with the course proposed to be followed by the counsel for the Petitioners.

Qualification
of a Sitting
Member de-
clared invalid.

Evidence was then given respecting the qualification of Mr. Gibson, and after hearing Mr. *Whitesides* and Mr. *Andrews*, the Committee resolved, after a very long deliberation, that Mr. Gibson was not duly qualified. (6)

Mr. *Harrison* stated, that as Mr. Gibson was declared to be disqualified, he appeared for electors who were admitted to defend the return.

(1) P. & K. 314.

(2) K. & O. 304.

(3) K. & O. 456.

(4) P. & K. 345.

(5) K. & O. 148, 149.

(6) The arguments of counsel upon this question are not given in consequence of the change in the law, relating to the qualification of members, made by the 1 & 2 Vict. c. 48.

Witnesses were called to prove the notice to electors of the disqualification of Mr. Gibson. It appeared that when the qualification oath was put to Mr. Gibson, there was some discussion. He stated that he would take the oath, but asked if it was proposed in order to insult his church, and some persons said, that it was uncourteous to put it. A witness in his examination respecting this transaction was asked, "To your knowledge was what took place on the day of nomination with respect to Mr. Gibson's qualification, publicly talked of in the town during the progress of the election?"

Mr. *Harrison* and Mr. *Andrews* objected to the question. There may be disqualifications that are notorious; in the present case it must be shown that notice of the disqualification was personally served upon the electors.

Mr. *Austin*.—It is only intended to prove that it was notorious that the qualification was questioned.

It was resolved—that the question might be put.

The notices of Mr. Gibson's disqualification to the effect, that the parties signing it were "advised" that Mr. Gibson was disqualified, were not published until eleven or twelve o'clock of the second day, and were then placarded upon the walls of the town and upon the court-house, in which the poll was taken. There were about 1900 voters, and about 500 placards were printed.

Mr. *Whitesides* contended that the votes given for Mr. Gibson, after the publication of the notice, were thrown away. *Southwark case*, (1) *Flint case*, (2) *Drogheda case*, (3) *Leominster case*, (4) *Fife case*, (5) *Abingdon case*, (6) *Cork case*. (7)

Mr. *Andrews*.—This is not a case in which the votes given can be considered to be thrown away; and secondly,

1838.

Votes given, after the publication of a notice of the disqualification of a candidate held to be null.

(1) *Cliff*. 134.

(2) 1 *Peck*. 206.

(3) *K. & O.* 213.

(4) *C. & D.* 12.

(5) 1 *Lud.* 455.

(6) *Rogers*, 211.

(7) *K. & O.* 391, 406, and see *Dublin University case*, 1 *Peck*. 496.

1838.

the notice was insufficient. It is not contended that there ought to be a new election, or that the majority of the electors shall determine whom they will elect, but that those who voted for Mr. Gibson after the notice was issued shall be treated as if they had been persons disqualified to vote. On what ground is this sought to be done? Is it upon account of a disqualification clear and notorious either in law or in fact? From the length of time that the Committee deliberated, before they made their decision, it may be assumed that the question before them was one of great doubt and difficulty. Yet, notwithstanding this, the Committee are to be called upon to say, that electors who voted for Mr. Gibson shall have their votes annulled, because some electors who knew nothing of either the law, or the facts of the case, thought proper to say that "as we are advised," Mr. Gibson has not a good qualification. On this representation the electors of Belfast are said to have been bound to rest assured that Mr. Gibson was not qualified. Mr. Gibson took the qualification oath; he had every reason to believe that he was qualified. How could any doubt prevail at Belfast upon the subject, when upon one side was the representation of persons who were ignorant of every thing relating to the fact and law of the case, announcing an opinion only as they were "advised;" and on the other, the express affirmation of being qualified made by a party who was justified in believing that his qualification would be considered sufficient, who had long been in possession of his qualification and had the title-deeds respecting it before him. Not one fact to impugn the qualification was brought home to the knowledge of a single elector. The cases in which votes have been thrown away after notice, have been those in which the disqualification was so clearly pointed out to the electors, that they could not entertain any reasonable doubt upon it; and the notice itself con-

tained a clear statement, founded upon the knowledge of the party giving it, of the ground of the disqualification. Here the conduct of Mr. Gibson and the character of his qualification, prove that there was no reasonable ground for the electors to entertain a suspicion that their votes, if given in his favour, would be invalid, or to give any credit to the statement contained in the notice.

 1838.

It was resolved—That the votes given for James Gibson, Esq., upon Friday and Saturday, were lost and thrown away.

The votes given during the days referred to in the resolution were, on the next day, struck off the poll of Mr. Gibson.

In *Owen M'Cann's case*, Mr. *Pollock* objected to the opening of the register, and argued the question at length. The Chairman informed Mr. *Thesiger*, that the Committee did not desire to hear him, being unanimously in favour of opening the register. This resolution was made without clearing the room and without any debate.

Register
opened.

After the majority in favour of Mr. Gibson was reduced, it was agreed that the objection made to the qualification of Mr. Tennant should be entered upon by the counsel for the Petitioners defending the return. Evidence at great length was given respecting the value of the property, and upon the terms of its conveyance; but the questions that were discussed, are set at rest by the provisions of the 1 & 2 Vict. c. 48. The resolution of the Committee was in favour of the sufficiency of the qualification.

The qualification of Mr. Dunbar, was also contested. Evidence was given and counsel were heard respecting it, but the Committee resolved, that the qualification was good.

The name of a voter, *John Campbell*, who was objected to, was contained in a list which set out the objections:—

1838. 1. That he was at the time of the election, employed in collecting the duties of excise. 2. That he was at the time of the election employed in the collection of the customs. 3. That he was at the time of the election employed in the collection of the revenue. The actual objection to the voter was, that he was a letter-carrier. (1)

Mr. *Thesiger* contended that the provisions of the statute respecting the specification of the objection to a voter had not been complied with. As the objections were set forth, it was impossible to know that a disqualification arising under the acts of Parliament relating to the Post-office would be insisted on; and the act of Parliament under which the disqualification arises, ought also to have been specified.

Mr. *Pollock* contended, that it was sufficient to object to the voter that he was employed in the collection of the revenue.

It was resolved—That the case should not be permitted to be entered upon.

A scrutiny relating chiefly to the value of the qualifications of certain voters was carried on for many days, and it was finally reported—

That Emerson Tennant, Esq. and E. Dunbar, Esq., were duly elected and ought to have been returned; that the Earl of Belfast and James Gibson, Esq. were not duly elected and ought not to have been returned; that neither the petition nor the opposition to it were frivolous and vexatious, and that certain votes had been struck off the poll.

(1) *Dublin case, ante, 198.*

CASE XXVI.

QUEEN'S COUNTY.

This Committee was appointed on February the 27th, 1838, and consisted of the following Members:—

James Loch, Esq. (Chairman), <i>Wick, &c.</i>	
Philip Pusey, Esq. <i>Berkshire.</i>	Archibald Hastie, Esq. <i>Paisley.</i>
Andrew White, Esq. <i>Sunderland.</i>	Lord Viscount Barrington, <i>Berkshire.</i>
Lord Dalmeny, <i>Stirling, &c.</i>	Edward Holland, Esq. <i>Hastings.</i>
David Morris, Esq. <i>Cardarthen.</i>	Lord Seymour, <i>Totnes.</i>
Hon. John Chambers Dundas, <i>York.</i>	Thomas B. Hobhouse, Esq. <i>Rochester.</i>

Petitioners—Electors.

Counsel for the Petitioners—

Mr. Theiger, Q. C., Mr. Austin, and The Honourable Mr. Talbot.

Agents for the Petitioners—Messrs. Fletcher and Roe.

Sitting Members—Sir C. H. Coote, Bart., and J. W. Fitzgerald, Esq.

Counsel for the Sitting Members—

Mr. Harrison, Q. C., Mr. Biggs Andrews, Q. C., and Mr. Close.

Agent for the Sitting Members—Mr. Baker.

The Hon. Mr. *Talbot* argued in favour of the opening of the register, and Mr. *Andrews* against it.

It was resolved—That it was the opinion of the Committee that they were precluded from opening the register by the Irish Reform Act, 2 & 3 W. IV. c. 88. In consequence of this resolution the petition was abandoned.

The Sitting Members were declared to have been duly elected knights of the shire of Queen's County.

CASE XXVII.

CARLOW BOROUGH.

This Committee was appointed on the 8th of March, 1838, and consisted of the following Members:—

Colonel T. Wood, (Chairman), <i>Breconshire.</i>	
John Rundle, Esq. <i>Tavistock.</i>	Edward Turner, Esq. <i>Truro.</i>
Lord Eliot, <i>Cornwall, E.</i>	John Henry Lowther, Esq. <i>Yerk.</i>
Philip Henry Howard, Esq. <i>Carlisle.</i>	Hon. George Henry Cavendish, <i>Derbyshire.</i>
Montague E. Newcombe Parker, Esq. <i>Devonshire.</i>	Thomas Houldsworth, Esq. <i>Nottinghamshire, & L.</i>
Frederick Dundas, Esq. <i>Orkney & Shetland Co.</i>	Francis Bernard Beamish, Esq. <i>Cork.</i>

Petitioners—Electors in the interest of F. Bruen, Esq.

Counsel for the Petitioners—Mr. Keating, Q. C. and Mr. Wrangham.

Agent for the Petitioners—Mr. Stephen.

Sitting Member—Henry William Maule, Esq., Q. C.

Counsel for the Sitting Member—Mr. Thesiger, Q. C. and Mr. Austin.

Agent for the Sitting Member—Mr. Baker.

The books of the borough of Carlow produced by the clerk of the peace of the county of Carlow.

The poll-books, together with the usual affidavits, were produced by the clerk of the peace of the county of Carlow, in whose custody they had been deposited after the election, the poll-books were accompanied by an affidavit of Mr. Clayton Brown, the sovereign and returning-officer of Carlow, but the Committee refused to admit the poll-books until Mr. C. Brown had been called as a witness to verify them. (1)

Mr. *Keating* argued in favour of the opening of the register, and Mr. *Austin* against it. It was resolved, "that it is the opinion of the Committee that the register cannot be opened." On which the Petitioners declined to proceed with the case.

(1) See *Ennis case*, K. & O. 432; *Sligo case*, ante, 566, and *Belfast case*, ante, 598.

CASE XXVIII.

CARLOW COUNTY.

The Committee was appointed on the 13th of March, 1838, and consisted of the following Members:—

Paulet St. John Mildmay, Esq. (Chairman), <i>Winchester.</i>	
Hon. A. F. Kinnaird,	Hon. C. P. Callaghan,
<i>Perth.</i>	<i>Dungarvon.</i>
Sir John Owen, Bart.	E. Boyd Rice, Esq.
<i>Pembrokeshire.</i>	<i>Dover.</i>
Joseph Neeld, Esq.	Lord Viscount Cantilope,
<i>Chippenham.</i>	<i>Helston.</i>
Hon. W. H. Ashe A'Court Holmes,	W. A. Mackinnon, Esq.
<i>Isle of Wight.</i>	<i>Lymington.</i>
J. Dennistoun, Esq.	Lord Robert Grosvenor, (1)
<i>Glasgow.</i>	<i>Chester.</i>

Petitioners—Electors in the interest of Messrs. Brown and Bunbury.

Counsel for the Petitioners—

Mr. Biggs Andrews, Q. C., Mr. Rushton, and Mr. Lovett.

Agent for the Petitioners—Mr. Baker.

Sitting Members—Nicholas Aylward Vigors, Esq. and John Ashton Yates, Esq.

Counsel for the Sitting Members—

Mr. Thesiger, Q. C., Mr. Austin, and Mr. Wrangham.

Agent for the Sitting Members—Mr. Alexander Bate.

In this case, Mr. *Andrews* argued in favour of the opening of the register, and Mr. *Thesiger* against it.

The Committee resolved, not to open the register, and the petition was thereupon abandoned.

(1) Excused attendance on account of indisposition. He attended the first meeting of the Committee and was elected Chairman, but stated that his health would not permit him to perform the duties of the office, and requested Mr. Mildmay to act for him, who consented to do so with the concurrence of the Committee. On the following day he was excused attendance by the House, and Mr. Mildmay acted as Chairman without any fresh election.—*Mirror of Parliament for 1838*, p. 272.

CASE XXIX.

WICKLOW COUNTY.

The Committee was appointed on the 7th of April, 1838, and consisted of the following Members:—

Charles Wood, Esq. (Chairman), <i>Hatfield.</i>	
John Lech, Esq.	Hon. George Anson,
<i>Wick District.</i>	<i>Staffordshire, &c.</i>
Daniel Whittle Harvey, Esq.	Charles Blackett, Esq.
<i>Southwark.</i>	<i>Northumberland.</i>
Right Hon. H. Labouchere,	James Irving, Esq.
<i>Taunton.</i>	<i>Antrim.</i>
George Evans, Esq.	David Morris, Esq.
<i>Dublin Co.</i>	<i>Carmarthen.</i>
George Bryan, Esq.	Peter Kirk, Esq.
<i>Kilkenny Co.</i>	<i>Carrickfergus.</i>

Petitioners—Electors in the interest of William Acton, Esq.

Counsel for the Petitioners—

Mr. Keating, Q. C. (*Dublin*), Mr. Thesiger, Q. C., and Mr. Wrangham.

Agent for the Petitioners—Mr. Alexander Bate.

Counsel for Mr. Grattan—Mr. Austin and Mr. Close, (*Dublin*).

Agent for Mr. Grattan—Mr. Potter.

Counsel for Mr. Howard—Mr. Biggs Andrews, Q. C. and Mr. Rushton.

Agent for Mr. Howard—Mr. Baker.

The petition was presented on the part of the Rev. Richard Quin and others, electors of the county of Wicklow. It set forth the election and the return, and alleged:

That William Acton had at the said election a majority of legal and valid votes over James Grattan and Ralph Howard, and that he ought to have been returned as a knight to serve in Parliament for the said county of Wicklow, as would appear upon the examination of the poll.

1838.

That at the said election persons were admitted to poll, and did poll for the said James Grattan and Ralph Howard, who were not entitled to vote thereat, and who had either been unduly and improperly registered as electors of the said county of Wicklow, or who never were qualified or had become disqualified from voting at the said election.

The petition then stated the usual charges of disqualification against parties who had polled for the said James Grattan and Ralph Howard, alleging " that thus a great number of persons, who for the causes aforesaid, or for other causes were not qualified or were disqualified, or had ceased to be qualified ; and of persons who were not entitled at the time of their respective registries to be registered, were admitted to poll and did poll at the said election in favour of the said James Grattan and Ralph Howard, and appear and were reckoned upon the poll of the said election in favour of the said James Grattan and Ralph Howard, whose votes ought to be disallowed and struck off the said poll as invalid and illegal votes."

The petition, also, contained charges of treating against the Sitting Members and their agents, and of acts of intimidation and violence alleged to have been committed by Roman Catholic clergy in order to induce electors to vote for the Sitting Members.

It was prayed, that it might be declared, that William Acton was duly elected, and ought to have been returned at the said election, and that his name might be substituted in the return accordingly, and that the said Sitting Members might be declared to have been unduly elected, and that their election and return might be pronounced wholly null and void ; and that the votes of the several persons who were unduly and improperly admitted to poll might be struck off the poll of the said election, and that the registry of the said county of Wicklow might be amended, by striking out the names of all persons who should appear

1838.

Double strike allowed in the case of a petition on the part of one candidate against two Sitting Members, though the charges in the petition, against the Sitting Members were common.

to have been unduly and improperly registered; and that such steps might be taken and directions given, as should effectually prevent persons whose names should be struck off the registry of the said county of Wicklow, from polling, or attempting to poll at any future election for the said county of Wicklow.

Mr. *Austin* stated to the House, that the Petitioners, having in their petition, submitted that Mr. Acton was duly elected and that his name ought to be substituted in the return for that of one of the Sitting Members, it would follow that in case the Committee should put him at the head of the poll, the interests of the two Sitting Members would become directly opposite to and conflicting with each other. The 9 Geo. IV. c. 22, sect. 33, provides "that if on the complaint of a petition of an undue election and return, there should be more than two parties before the House on distinct interests, or complaining or complained of upon distinct grounds, whose right to be elected or returned may be affected by the determination of any such Select Committee, each of the said parties shall successively strike off a member from the thirty-three members chosen by lot, until the number be reduced to eleven." Here Mr. Grattan and Mr. Howard are both petitioned against, and Mr. Acton alone is opposed to them. If Mr. Acton should succeed in his petition and show that he was entitled to the seat, Mr. Howard and Mr. Grattan would have to contend for the other seat. In law, therefore, the parties are entitled to a separate strike, and it is impossible for them to agree upon a joint strike, their interests being opposed.

Mr. *Biggs Andrews* on the part of Mr. Howard also contended for a separate strike.

Mr. *Thesiger* contended against the right to a separate strike, there being common interest, and the petition com-

plaining of the return upon grounds equally affecting both the Sitting Members. *Peckwell.* (1) 1838.

Mr. *Keating* on the same side with Mr. *Thesiger*, also contended that there was no distinction in the interests of the Sitting Members. They had at the election stood upon the same interests—they had joint Committees, and they had respectively voted for each other.

Mr. *Austin* replied after some opposition. The Act of Parliament refers to the diversity of interests arising out of the form, or the effect of the petition. What might have been the relative position of the parties during the election is entirely beside the question of the interests of the parties and their relative position before the Committee. (2)

Upon a division of 124 to 112, it was resolved, that James Grattan, Esq. and Ralph Howard, Esq., be permitted to appear as separate parties on distinct interests.

Upon the meeting of the Committee, Mr. Fenton, acting clerk of the peace for the county of Wicklow, produced the poll-books, and upon an objection being taken to the production of the affidavit, the Committee *resolved*—That if there was any objection to the production of the poll-books by this witness, it must be settled in the first instance, and that the Committee did not consider the affidavit, to be at present, before them.

(1) 1 Peck. In. 48.

(2) The reporters were not informed that the claim for a separate strike was to be made to the House, and were, consequently, not present at the ballot. In addition to the arguments shortly mentioned in the text, they have been informed that there were cited the *Hindon case*, Jan. 31, 1775, where the Sitting Members were severally complained of for bribery; they had been candidates on distinct interests, but the charge was separate in its nature, and no objection was made to a separate strike.—*Dorchester case*, 1 Doug. 347. The Sitting Members allowed to separate, by consent of the Petitioners, several who had voted for one not having voted for the other, and this, though the Petitioners had a joint interest against both, yet if a majority should be established against both their interests would become separate.—*Colchester case*, Journals, March 3, 1791.

1838. It appeared, that the clerk of the peace, who was absent from Ireland at the time of the election, and who was since dead, had appointed the witness, Mr. Fenton, to act as his deputy. The witness assisted at the poll, he superintended the business of the election, and he had transacted the entire business of the office of the clerk of the peace, under a deputation, from March, 1834, until about the time he left Ireland. He signed the affidavits of registry, he had had the custody of the records of the county, and he received the poll-books at the close of the election. His principal had been dead only a short time, and he had heard of his death since he had received a warrant to attend the Committee. A clerk of the peace *pro tempore* had been appointed the Saturday before the witness left Dublin. The order of the Speaker required Mr. Fenton, "as acting sub-sheriff of the county, and such other person or persons who have in his or her custody or power the poll-books" to produce them.

Poll-books permitted to be produced by a party who had acted at the election as deputy of a clerk of the peace deceased since the election.

Mr. *Austin* objected to the production of the poll-books as not coming from the proper custody.

Mr. *Wrangham* was prevented by the Chairman from commencing an argument in answer, the Chairman stating that the Committee were of opinion, that the delivery of the poll-books by the sheriff of the county of Wicklow at the last election to Mr. Fenton, the deputy clerk of the peace of that county, was a sufficient compliance with the 3rd section of the 60 Geo. III. and 1 Geo. IV. c. 11, and that the objection taken could not be sustained.

Register closed.

Mr. *Austin*, upon evidence to a vote being given, took the objection that the register could not be opened, and was heard to argue the question.

Mr. *Thesiger* argued against the objection.

It was resolved.—That the Committee are of opinion

that under the provisions of the Irish Reform Act, they have no power to open the register. 1838.

The petition was abandoned in consequence of this resolution.

The Sitting Members were declared to have been duly elected, and that neither the petition nor the opposition to it, were frivolous or vexatious.

YOUGHAL.

The following case was accidentally omitted at page 427, *ante*.

REV. PERCY SMITH'S CASE.

The voter was objected to as having been illegally admitted a freeman of the borough of Youghal. He was a second son, and the father had been a freeman. An order was made August 15, 1808, to admit the elder brother to the freedom, but he was shipwrecked and drowned, leaving no issue, and had not been admitted. The father died before the elder brother and both were dead before the voter was admitted.

Second son of a freeman not entitled to his freedom after the death of his elder brother, who died after the father.

It was contended, that the voter not being the eldest son at the decease of the father, was not entitled to be admitted to the freedom of the borough in right of birth.

It was resolved, that the vote be struck off the poll.

CASE XXX.

WESTMEATH.

This Committee was appointed upon the 22nd of May, 1838, and consisted of the following Members :—

Robert Palmer, Esq. (Chairman), <i>Berkshire.</i>	
John Round, Esq. <i>Maldon.</i>	Charles Fysche Palmer, Esq. <i>Reading.</i>
James Stewart, Esq. <i>Honiton.</i>	Edmund Wodehouse, Esq. <i>Norfolk, E.</i>
Col. Thomas H. H. Davies, <i>Worcester.</i>	Sir Stephen Glynne, Bart. <i>Flintshire.</i>
Lord George Bentinck, <i>Lyme Regis.</i>	Sir George Staunton, Bart. <i>Portsmouth.</i>
W. Battie Wrightson, Esq. <i>Northallerton.</i>	George Thornhill, Esq. <i>Huntingdonshire.</i>

Petitioners—

Electors in the interest of Sir R. Levinge, Bart. and R. Hancock, Esq.

Counsel for the Petitioners—

Mr. Wrangham, Mr. Lefroy (*Dublin*), and Mr. Berry (*Dublin*).

Agents for the Petitioners—Messrs. Courtenay and Co.

Sitting Members—Sir R. Nagle, Bart. and Montague Lowther Chapman, Esq.

Counsel for the Sitting Members—

Mr. Theiger, Q. C., Mr. Austin, and Mr. Tighe (*Dublin*).

Agents for the Sitting Members—

Mr. Baker (*London*), and Messrs. Dolan and Potter (*Dublin*).

The petition set forth that the election of members to represent the county of Westmeath, took place upon the 10th of August, 1837, and that Sir R. Nagle, Bart., M. L. Chapman, Esq., Sir R. Levinge, Bart., and R. Hancock, Esq. were candidates; that a poll commenced upon the 10th of August and continued until the 15th, when the numbers polled were declared to be :—

M. L. Chapman	- - -	840
Sir R. Nagle	- - -	798
Sir R. Levinge	- - -	388
R. Hancock	- - -	393

That unqualified voters were admitted to poll, and that riotous and tumultuous proceedings occurred during the election. It prayed, that the election of Mr. M. L. Chapman and of Sir Richard Nagle might be declared to be null and void, that the votes of unqualified persons should be removed from the poll, and that Sir R. Levinge and Richard Hancock might be declared to be duly elected.

1838.

JAMES ANDERSON'S CASE.

Mr. *Austin*, in this case, argued against the registry being opened, and Mr. *Wrangham* in favour of its being opened. Register opened.

It was resolved—That the power of the Committee to examine into the validity of votes on the Irish register has not been taken away or limited by the Irish Reform Act.

APPLICATION FOR A COMMISSION.

Mr. *Thesiger* applied for a commission, under the 42 Geo. III. c. 106, to examine witnesses in Ireland. If ever there was a case in which the provisions of that act could be applied it was the present. The majority of the Sitting Members was so large that there could be little, or no expectation to reduce it. No less than 405 votes must be struck off the poll in order to seat either of the defeated candidates. The only legitimate object of a petition is to gain a seat, and not to seek for something that falls short of this—not as in this case, in which it has been said to be the chief object, to purge the register of unqualified persons. To seat one of the candidates, above 400 cases must be inquired into. If five cases a day are disposed of, the Committee must sit eighty days, and the expense of bringing over and maintaining witnesses will be enormous. There have been 639 objections taken. Of

Commission to examine witnesses in Ireland refused, and subsequently resolved, that such a commission should issue.

1838. these, fifty-one relate to freehold votes; 475 to the insufficiency of the value of the qualification; three to insolvents; eleven, that part of the qualification has been parted with; nineteen to persons ejected; fifty-five to defective registration on the grounds of imperfect affidavits; nine to cases where the interest of the lessor has ceased; and thirteen are cases of joint-tenants. All these must be examined into as distinct and separate cases. The expense and inconvenience contemplated by the statute as the ground upon which, if proved, the commission is to issue, must in this case be great. The 42 Geo. III. c. 106, s. 4, provides "upon its appearing to the said Committee that from the nature of the case and the number of witnesses to be examined relative to any particular allegations in the said petition, that the same cannot be effectually inquired into before such Committee without great expense and inconvenience to the parties or either of them, it shall and may be lawful for the said Committee upon the application of the said parties before the said Committee, at any period in the course of the proceedings upon such petition, to make an order for the nomination and appointment of commissioners in manner herein directed." The petition was presented upon the 6th of December, on the part of four Petitioners, and three of them were served with a notice of this application upon the 9th, and the fourth upon the 12th of December. The notice was given as early as it was possible. If the facts to be given in evidence shall prove the inconvenience and expense of continuing the inquiry here, the words of the statute "shall and may" order the commission, are imperative, and the commission must issue. *Dwarris on Statutes*; (1) *Dublin case*; (2) *Morden's Charity*; (3) *R. v. Barlow*; (4) *R. v. Urkwold Inclosure*. (5) The necessity

(1) Vol. II. 712.
(4) 2 Salk. 608.

(2) *Ante*, p. 104. 105.
(5) 2 Chitt. 251,

(3) 3 Atk. 166.

of a commission is greater in this than in almost any former case. *Dublin University*; (1) *Waterford*; (2) *Drogheda*; (3) *Dublin case*. (4) 1838.

Mr. Dolan, the agent of the Sitting Members was called, and was examined respecting the expense of bringing witnesses from Westmeath to London, the cost of maintaining them in London, and the expenses of their return; the number of witnesses needed, and the inconvenience of their attendance.

Mr. *Wrangham*.—Whatever saving there may be in time or expense in a commission, it is more than counter-balanced by the imperfect mode of any inquiry carried on under it. But in fact, a commission will produce delay so enormous that nothing but the most stringent necessity ought to induce a Committee to grant it. When the 42 Geo. III. c. 106, was passed, a totally different state of circumstances prevailed in reference to the communication with Ireland than now exists. Communications with Ireland can be made with little difficulty, and both witnesses and papers can be obtained from that country within a short interval of time. What can be a greater hardship to a petitioner than to have the determination of his case delayed? In the *Dublin case*, the commission was issued in April, 1835, and the Petitioners were not seated until May, 1836. When Parliament may be about to be dissolved the hearing of the case may terminate. In the *Drogheda case*, the commission was never returned, the Sitting Member holding his seat until Parliament was at an end. The time that may be occupied in this inquiry, if pursued by the Committee, is not to be judged of by the number of objections. They may be numerous, but the disposal of them may not occupy many days. In the *Longford Committee* of 1837, ninety-three cases were dis-

(1) 1 Peckw. 21.

(3) C. & D. 113.

(2) 1 Peckw. 228.

(4) *Ante*, 106.

1838.

posed of within three weeks ; but the expense to the Petitioners, if a commission is granted, will be enormous. They have prepared for the hearing of their case ; their witnesses are in town ; their preparations are complete, and it will be inflicting upon them a great hardship, if they shall not be permitted to proceed.

The Committee *resolved*—That they would not appoint a commission in Ireland to take evidence in the matter of the Westmeath election petition.

After the time of the Committee had been occupied until June 5, with two cases relating to the value of the qualification of the parties objected to, a member of the Committee inquired, if the Committee could re-consider the propriety of granting a commission to examine witnesses ?

Mr. *Thesiger* replied, that the Committee could do so, and without repeating his former argument, begged leave to renew his application.

Mr. *Wrangham* strongly objected to this course being taken, the application having been refused when first made after a full argument.

The Committee *resolved*—That a commission should issue as prayed.

JAMES ANDERSON'S CASE.

Criterion of value is what a solvent tenant could give as rent over and above the rent and charges paid by the voter.

The objection in this case was, that the qualification of this voter was not of sufficient value. Upon a witness being asked, if a solvent and responsible tenant could, without fraud or collusion, give 10*l.* a-year for the land held by the voter;—

Mr. *Thesiger* objected to the question, on the ground that such a test of value was not required by the Irish Reform Act.

Mr. *Wrangham* objected to any question upon the

value being raised, until after he should have completed his case, and should have summed up the evidence.

1838.

Mr. *Thesiger* objected to the evidence proposed to be given as irrelevant. If he should succeed by argument in proving this to be the case, it ought not to be taken down.

The Committee *resolved*—That the objection to the question, with a view of determining at once, the criterion of value of the qualification of a tenant under the Irish Reform Act, might be taken.

Mr. *Thesiger* was heard at length in support of his objection, and Mr. *Wrangham* against it. (1)

After hearing Mr. *Thesiger* in reply, the Committee *resolved*—That the value of the qualification that entitles a party to register and to vote as a freeholder in a county at large in Ireland, under the 2 & 3 Wm. IV. c. 88, is the same as was prescribed in the case of a freeholder in the 10 Geo. IV. c. 8, and that, therefore, the criterion of value is what a solvent and responsible tenant can afford to pay fairly and without collusion, as an additional rent, over and above the charges payable in respect of such qualification.

The examination of the witness was then continued, and the vote was eventually struck off the poll.

Before the names of the commissioners were struck, Mr. *Wrangham* stated, that the list of barristers who had agreed to act, had been improperly returned, and that the names of some barristers were omitted in the list, in consequence of the office of the clerk of the crown at Dublin having been improperly closed. The 42 Geo. III. c. 106, s. 9, provides “ that the clerk of the crown in Ireland or

Appointment of
commissioners.

(1) The arguments are not given, as their substance is elaborately stated in opposition to the decision of the Committee, in the judgment of Baron Richards, in *James Fiegnys case*, reported by Thomas Welsh, Esq. (Dublin, 1837), and in accordance with the opinion of the Committee, in the judgment in *Glennon's case* (Alcock's Reports, p. 55.)

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his deputy, shall *at the commencement* of every session of Parliament, send over to the Speaker of the House of Commons of the united Parliament, a list of all such barristers of not less than six years standing, who shall have consented, under their hands and seals, to act either as commissioners, or as chairman to the commissioners for the purposes of this act." The clerk of the crown closed his office upon the day on which Parliament met. He then opened it again and kept it open until the day on which the Queen's speech was delivered. Some names of barristers were delivered in the interval, between the first and second closing of the office, and were received after the session commenced. Upon an objection to the list, made by Mr. *Wrangham*, the opinion of the Speaker was asked, and the Chairman reported, that it appeared that on the 15th of November, the day upon which the Parliament was summoned to meet, the Speaker had received from the clerk of the crown in Ireland, a list of the names of forty-four barristers of six years standing, who had consented to act as commissioners; that upon the 16th he received an additional name, and that upon the 21st, he received fourteen other names, but that the last list had been made up in Ireland before the 20th, on which day the session was opened by her Majesty. Mr. Speaker had carefully looked through the Act of Parliament and the journals of the House, and he was of opinion, that the commencement of the session referred to in the act did not necessarily mean the first day of the session, and that although he received the lists on the days mentioned, he did not communicate to the House the receipt of all the lists until ten days afterwards. In 1834, his predecessor did not communicate the receipt of the lists until after a much longer time had elapsed, and Mr. Speaker was of opinion that the words of the act were to be construed to mean such reasonable time after the meeting of Parliament

as would give all the parties interested an opportunity of knowing and having fair notice of the names of the barristers qualified to act as commissioners in Ireland. In this case so long a time had elapsed from the commencement of the session to the ballot for the Committee, that he thought there could be no objection to the lists to prevent the commission from issuing. 1838.

Mr. *Wrangham* added, that he complained that by the conduct of the clerk of the crown in Dublin, in closing his office, the reception of certain names had been prevented. No evidence was given in support of this objection; nor, indeed, of that upon which the opinion of the Speaker was taken.

The names of the commissioners were then struck. Messrs. Plunkett and Jebb were nominated by the parties. A difference of opinion existing respecting the choice of the Chairman, the room was cleared, and the Committee came to the resolution to appoint Mr. John O'Dwyer.

The clerk of the peace applied for the poll-books and affidavits of registration, but it was agreed, that they should be sent with other documents, under the order of the Chairman of the Committee to the commissioners. Poll-books and affidavits.

Both parties consented that the objection to James Anderson, whose vote had been declared by the Committee to be valid, and the objection to Edward Lacey, whose vote had been struck off the poll, should be excepted from the matters referred to the commissioners; and, also, that the charges of bribery and intimidation should be abandoned.

The Committee made an order, that the commissioners appointed should receive evidence pursuant to the 42 Geo. III. c. 106, that the charges of bribery, intimidation, and the cases of James Anderson and Edward Lacey should be excluded from the inquiry, and that the com-

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missioners should adopt as the criterion of the value of the qualification which enables a party to register and vote, that which they had declared in *Anderson's case*.

Upon June 7th, the Chairman informed the House, that one of the parties before the Committee having applied for a commission under the provisions of an act passed in the forty-second year of King George the third, for regulating the trials of controverted elections or returns of members to serve in the United Kingdom for Ireland, and it having appeared to the Committee, from the nature of the case, and the number of witnesses to be examined relative to the allegations in the said petition, that the same cannot be effectually inquired into before the said Committee without great expense and inconvenience to the parties, the Committee have thought it necessary to order, and they have accordingly made an order for the nomination and appointment of commissioners to examine evidence in Ireland respecting certain facts, allegations, matters, and things referred to the said commissioners, and specially assigned and limited in the said order.

That the parties interested in the said commission have nominated two barristers, and that the Committee have appointed a third barrister as Chairman, qualified according to the provisions of the said act, and that the said three barristers so agreed upon and consenting to act by virtue of the said act, became and are the commissioners for the execution of the said order.

That the Chairman of the said Committee, has issued a warrant under his hand and seal, directed to each of the commissioners appointed as aforesaid, commanding them and each of them, under the penalty of five hundred pounds, to repair to the town of Mullingar, in the said county of Westmeath, on Wednesday, the 27th day of June instant, and has addressed to the Chairman of the said commission a true copy of the petition referred to the

Committee, and of the statements and lists of the parties delivered to the Committee, together with a true copy of the order made by the Committee as aforesaid.

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That the Committee have gone through that part of the said petition relative to the proof of the poll, and that they have gone through all the other parts of the said petition, except what have been specially referred to the commissioners in Ireland herein-mentioned:—And they humbly ask permission of the House to adjourn until such time as Mr. Speaker shall by his warrant, in manner directed by the said act, direct the Committee to re-assemble.

The evidence before the commissioners in Ireland was only completed with reference to one voter of the name of Edward Lacey.

On February 19th, 1839, the Committee re-assembled, when the agents, upon both sides, consented to the termination of the case.

The Committee reported, that the Sitting Members were duly elected knights of the shire of Westmeath; that neither the petition nor the opposition to it were frivolous or vexatious, and that they had struck the name of Edward Lacey off the poll as not having had a right to vote at the said election.

CASE XXXI.

CITY OF DUBLIN.

This Committee was appointed upon the 13th of March, 1838, and consisted of the following Members :—

Lord Seymour, (Chairman), <i>Totnes.</i>	
Edward George Barnard, Esq. <i>Greenwich.</i>	Edward Buller, Esq. <i>Staffordshire.</i>
George Byng, Esq. <i>Middlesex.</i>	William Augustus Johnson, Esq. <i>Oldham.</i>
Sir James Rivett Carnac, <i>Sandwich.</i>	William Evans, Esq. <i>Derbyshire, N.</i>
Charles Grey Round, Esq. <i>Essex, N.</i>	Ellis Cunliffe Lister, Esq. <i>Bradford.</i>
Edward Stanley, Esq. <i>Cumberland, W.</i>	Fitstephen French, Esq. <i>Roscommonshire.</i>

Petitioners—Electors.

Counsel for the Petitioners—

Mr. Theaiger, Q. C., Mr. Keating, Q. C. (*Dublin*), and Mr. Wrangham.

Agent for the Petitioners—Mr. Edward Maguire.

Sitting Members—Daniel O'Connell, Esq. and R. Hutton, Esq.

Counsel for the Sitting Members—

Mr. Austin, Mr. Roebuck, and Mr. H. Hutton (*Dublin*).

Agents for the Sitting Members—

Sir Robert Sydney (*London*), and Mr. Woodcock (*Dublin*).

The petition was presented by electors, on the part of Messrs. West and Hamilton, against the return of Messrs. O'Connell and Hutton. The poll commenced upon Tuesday, August 1, and ended Saturday, August 5, 1837.

The poll-books were produced by the clerk of the peace of the City of Dublin, together with the usual affidavit and were admitted without objection.

The number of objections made by the Sitting Members

to votes given for Messrs. West and Hamilton was 1854; 1838.
 and the number of objections to votes made on the part of
 the Petitioners was 2503.

MICHAEL BROUGHAM'S CASE.

The voter was objected to on the ground of a defect in the affidavit of registry. The affidavit set out, that the premises in the possession and occupation of the voter were *bond fide* of the clear value of not less than 10*l*. The form of the oath in Schedule (C.) No. 8, of the 2 & 3 Wm. IV. c. 88, contains the words "*bond fide* of the clear *yearly* value of not less than 10*l*." In this case the affidavit omitted the word "yearly."

Affidavit of registry not invalid, if it omits to state that the qualification of a householder is of the yearly value of 10*l*.

Mr. Keating.—The 2 & 3 Wm. IV. c. 88, s. 19, directs that the oath of a person registered as a voter shall be in the form stated in Schedule (C.) of the act, and by s. 20, the registering barrister is required to take care that such oath shall be agreeable to the form thereby prescribed. In the oath set forth in the schedule and directed to be followed, the party registered is to swear, that his qualification is of the "yearly" value of 10*l*. This word "yearly" is a material expression in describing the extent of the value. In former acts of Parliament, relating to the electoral franchise, a similar limitation of the qualification is to be found. 8 Hen. VI. c. 7; 10 Hen. VI. c. 2; 2 Geo. I. c. 19, s. 3; 19 Geo. II. c. 11, s. 4; 21 Geo. II. c. 10, s. 2; 15 & 16 Geo. III. c. 16, s. 8; 25 Geo. III. c. 52, s. 1. The word "yearly" runs through all these acts, and is a material part of the description of the franchise. The title of the voter depends upon his having a qualification of 10*l*. yearly value. The evidence of this is, his affidavit. If it sets forth a qualification different from that mentioned in the statute, it is fatal, and the affidavit and registration are null. Long-

1838. *ford case*; (1) *Hudson on the Law of Elections*; (2) *Davidson v. Gill*, (3) in which a question arose upon an order made by justices of the peace under the 13 Geo. III. c. 78, s. 19, which prescribed that a particular form of affidavit set forth in the schedule "shall be used on all occasions, with such additions only, as may be necessary to adapt it to the particular exigency of the case." A material variance from the form prescribed occurred in the making out of the affidavit, and it was held that it might be taken advantage of. If the form is what is called substance, it cannot be departed from without destroying the validity of the act. In the present case, the statute required a substantial part of the qualification to be specified in the affidavit, and the omission of it makes the affidavit void.

Mr. Austin.—The 2 & 3 Wm. IV. c. 88, directs that a householder desirous to register, shall give a notice according to form contained in Schedule (C.) No. 8, in which he shall set out, that his house is of "the clear yearly value of not less than 10*l*." After this notice, he is to appear before the registering barrister, and is to swear to a qualification of the same value as that mentioned in his notice. Then according to sect. 19, "if the barrister shall deem such claimant to be entitled under this act to be registered for the county, city, &c. to which his claim shall relate," the barrister is "to declare and adjudge," that he is entitled to be registered, and this he is to do after a full examination of the particulars of the case according to the directions of ss. 16 and 17. So that there is an adjudication upon the title of the party to be registered, before any affidavit is drawn up. After this adjudication is made "the person so declared entitled," is to verify his title by oath, according to a particular form, and sect. 20, declares that "such barrister is hereby required to take care that such oaths shall be agreeable to the form hereby

(1) P. & K. 176.

(2) 202—206.

(3) 1 East, 64.

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prescribed, or as near thereto as may be, and that no objection in point of form shall at any time hereafter be allowed to any such oath, when signed." It is the barrister who is to see that the affidavit is correct—

The *Chairman* stopped Mr. *Austin*, and stated that it was the unanimous opinion of the Committee, that he need not continue his argument, (1) and it was *resolved*, that the objection to the vote of Michael Brougham cannot be allowed.

WILLIAM HARE MAUNSEL'S CASE.

The voter tendered his vote for Messrs. West and Hamilton, and was refused by the assessor of the returning-officer, on the ground that he had not been registered as a freeman six months previous to the 17th of July, 1837, the day of the teste of the writ of election. He was registered upon the 3rd of March, 1837. (2)

A freeman must be registered six months, before he is entitled to vote.

Mr. *Wrangham*.—The 1 Geo. II. c. 9, (I. A.) s. 8, provides "that no person shall be admitted to vote at any election of any member to serve in Parliament, or of any magistrate in any city, or town corporate where such freeman hath not been free six calendar months before such election, unless he was admitted free by service to some trade, or by birthright, or being entitled to his freedom had demanded it six months before such election." There is a similar provision in the 35 Geo. III. c. 29, s. 29, and in the 4 Geo. IV. c. 55, s. 32, under these acts admission to the freedom for six months previous to an election was necessary to enable a freeman to vote. The Irish Reform Act of the 2 & 3 Wm. IV. c. 88, introduces, for the first time, the registration of freemen. The 9th sect. provides,

(1) *Tralse case, ante, 322.*

(2) There was no evidence given of the time when this voter was admitted to his freedom, or in what right, or under what circumstances he was admitted.

1838. " that all freemen who, by law, are entitled to vote, may, so long as they reside within the city or seven statute miles of the place of election, enjoy the right of voting as fully and in like manner as if this act had not been passed." The 29th sect. enacts, " that every person who shall register under the act, shall be entitled to vote at any election to be held by virtue of any writ tested six calendar months, at least, after such registry." This section applies to the new rights of voting, and does not affect the rights reserved in section 9. A freeman who had a right to vote, without registration, under the old law, does not lose his right to vote,—on the contrary, it is reserved, even if he is not registered six months previous to the election at which he tenders his vote. The 9th section preserves his former rights, and the 55th section, also, preserves all laws in force respecting elections in Ireland, except so far as the act repeals or alters them. *Hudson on the Law of Elections.* (1)

Mr. *Austin*.—Section 29 of the 2 & 3 Wm. IV. c. 88, applies to all the clauses relating to rights of voting, whether old or newly acquired rights. The reservation of " such right of voting," mentioned in the 9th section, is a reservation of rights to such persons who comply with the directions of the act. The act is to be read under its various classifications: the first part refers to rights of voting, the second, to registration, and so on. But the parts relating to registration are general, and make no exception. If read in this way and taken as parts of a whole, there is no inconsistency and contradiction between the 9th and 29th sections. The 9th provides, that a party " after such registration as is directed by this act shall be entitled to vote;" and the 29th provides, that it must be a registration that has been made six months before the time of election. The words of sect. 3, re-

(1) P. 143.

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serving the rights of voters for counties, are far stronger than those reserving the rights of freemen in sect. 9, yet it will not be contended, that the sect. 29, does not apply to voters for counties? Sect. 13 provides, that no person shall be registered for lands, &c. unless in the possession thereof, and in the receipt of the rents to his own use, six calendar months previous to his registry, unless entitled by descent, succession, marriage settlement, devise, or promotion to any benefice or office, yet even in these excepted cases, if registered, a voter will not be entitled under sect. 29, until after the six months have elapsed from the time of registration. Beneficed clergymen were formerly entitled to vote immediately upon coming into possession of their benefice, yet the reservation of sect. 55, does not exempt them from registration, or when registered, from the operation of sect. 29. But even if this voter was within a class of freemen whose rights were reserved by sect. 9, and the legislature had intended that they should vote immediately upon registration, there is no provision in the affidavit, to enable the returning-officer or his assessor to ascertain in what right, as a freeman, the voter registered, whether by birth, servitude, marriage, or what other title. The same form of affidavit is given for all classes of freemen. They are all to be registered in the same manner, and the only fact that the returning-officer can regard, with reference to their right to vote, is the date of their certificate or affidavit, whether or not six months have elapsed since the affidavit of registry was made out. It is clear that the legislature did not intend any class of persons directed to be registered, should be discriminated or exempted from the operation of the section relating to a registration for six months previous to the date of any writ under which an election may be held. As respects freemen, this point was expressly decided in the *Youghal case*, (1) after a full argument.

(1) K. & O. 448.

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Mr. *Wrangham* replied.

The Committee *resolved*—That the vote of William Hare Maunsel should not be placed upon the poll.

Registry.

In this case, Mr. Archer, clerk of the peace of the City of Dublin, was asked respecting a certain document, "Is that parchment, a certificate, or memorandum of the right in which the voter was admitted as a freeman?" To this question, Mr. *Austin* objected, on the ground that the Committee were confined to the affidavit or certificate of the title of the voter, and that to enter into the examination proposed, would be to open the Irish registry. The 54th sect. of the 2 & 3 Wm. IV. c. 88, enacts, "that the certificate by this act directed, or in default of its production, the original affidavit of registry, shall be conclusive of the right of voting of the person named therein." After Mr. *Wrangham* had been heard, and Mr. *Austin* replied, the Committee *resolved*, that the document should not be admitted.

THOMAS KEOGH'S CASE.

A voter registered for a qualification that he had parted with before he voted, and also for another qualification, held not to lose his vote, if he retains a good qualification, though he polled in respect of the qualification he had lost.

This voter was objected to on account of the loss of the qualification in respect of which he voted. The entry in the poll-book was:—

No. 217. Thomas Keogh, Householder, Dairyman, 7, Wall's Lane.

An affidavit of the registry of the voter for a qualification in Wall's Lane, dated Nov. 7, 1832, No. 217, was produced, and also another affidavit of Thomas Keogh, dated in 1835, No. 324, for a qualification, No. 131, Francis Street.

Mr. *Austin*, stated, that the party had quitted the premises for which he had first registered, and that he was

re-registered. The wrong affidavit had been produced at the poll. (1) 1838.

Mr. *Keating*.—The evidence establishes the fact, that Thomas Keogh, registered for a house in Wall's Lane, voted in respect of that qualification. It is admitted that the voter did not possess this qualification at the time he polled, but no evidence is given to identify Thomas Keogh, of Francis Street, to be the Thomas Keogh of Wall's Lane. All that the Petitioners can be called to do, is to prove that the qualification of the voter, for which he polled, did not exist at the time of polling.

Mr. *Austin*.—If in England there are two persons upon the poll, of the same name, it must be shown which of the two it is intended to strike off; or if there are two persons of the same name on the register, and one on the poll, it must be shown which of the two is polled. If this has been done in this case, it is still requisite to show that the voter was not entitled to poll. In Ireland, when a voter polls, he either produces his certificate of registry, or his affidavit. It is not shown that this voter produced his wrong certificate, or polled from a certificate. If he made a mistake it would not be sufficient to strike him off the poll. *Gibbon's case, Bedford*. (2) If he had two rights of voting, and voted in respect of the wrong one, he would not be concluded. Moreover, he might have polled from his affidavit, and then neither the error of the entry, nor that of producing the wrong affidavit, could be ascribed to him. In the bustle of the poll-booth, he would be unable to correct such mistakes. All that he could do would be to declare for whom he voted.

It was resolved—that it was not made out, that Thomas Keogh had no right to vote.

(1) There was no evidence given of these facts, but as they were not contradicted, nor proof of them required, they were no doubt admitted.

(2) P. & K. 139. C. & R. 87, and see *Bedford case, ante, Barham's case, Well's case, and Robinson's case*, pp. 441, 442, and 443.

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THOMAS BUSH'S CASE.

The Pipe-
Water Rent of
the City of
Dublin not a
municipal tax.

This voter was objected to, upon the ground that he had not, previous to his voting, paid his arrears of the Pipe Water Rent. The question raised, was, whether or not the Pipe Water Rent was a municipal tax. (1)

Mr. *Keating*.—The language of the 42 Geo. III. c. 92, (L. & P.) under which this tax is collected, proves it to be a municipal tax within the 2 & 3 Wm. IV. c. 88. The 3rd section is important, as it shows that the act uses the words “rent” and “rate” as equivalent expressions, and thus destroys any conclusion that may be attempted to be drawn from the use of the former expression. The words in Schedule (B.) of the Irish Reform Act, are not confined, however, to taxes. The voter is to swear, before the returning-officer, “that not more than one half-year’s grand jury, or municipal cesses, rates, or taxes” are due by him. From the preambles of the various acts relating to the Pipe Water Rate, its public and municipal character appears. 6 Geo. I. c. 16, s. 1 (2); 15 & 16 Geo. III. c. 24; 19 & 20 Geo. III. c. 13; 28 Geo. III. c. 50, s. 1. All these acts point out public benefits derivable from the water rates. The 42 Geo. III. c. 92, (L. & P.) especially mentions the benefit to the city in having sufficient water to extinguish fires. The rates, also, are directed to be levied by the corporation without any discretion. The 42 Geo. III. c. 92, s. 3, regulates their amount. The charge is fixed, and cannot be varied at the pleasure of any party. That this payment thus directed to be levied is a tax or rate, the words of the statutes cited clearly prove; and that it is a municipal tax is shown, by its being for the benefit of the city—or of the *municipium*. It is a tax levied for public purposes and is for the public

(1) *Ante*, Francis Coleman’s case, p. 141.

(2) *Ante*, p. 141.

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advantage. Some parts of the city are not liable to it, but this does not affect its character. That the lighting and paving rate is a municipal tax, has not been disputed, though there are parts of the city not liable to it. The former *Dublin* Committee decided that this rent or rate, was a municipal tax. (1)

Mr. *Austin*.—In vindication of the resolution of the former Dublin Committee, it should be stated, that the evidence before it, was not so extensive and complete as in this case. The difficulty that has arisen upon this question, has been from the use of the word “municipal.” It was not a term used in any statute, until introduced in the Irish Reform Act. A “municipal tax” means a tax universal within a given locality. A *municipium* formerly was a district within which *munera publica* were carried on. In it the local government was frequently supreme, and taxed all property within the *municipium*. The English Municipal Reform Act, 5 & 6 Wm. IV. c. 76, affords a legislative exposition of the word “municipal.” This act regulates the limits of boroughs, and gives to the recorder and other public officers jurisdiction within them; it confides to the corporate body the watching and lighting of towns, as necessary municipal functions, and contains directions respecting the police, and the levying and expenditure of rates for local purposes. If in England, the payment of municipal taxes was a condition of voting, the payment of a watch rate, and a lighting and paving rate would be necessary; but not a pipe-water rate, if any municipal corporation, as part of its estates, possessed a right to certain springs or streams of water, even if it had their possession and use, guaranteed, and regulated by a local act of parliament. The English Municipal Reform Act, in pointing out what are municipal taxes, puts a gloss on the Irish Reform Act, and determines this ques-

(1) *Ante*, 141.

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tion. In England, assessed taxes and poor-rates are public and universal in their nature and application. It was, therefore, not surprising, that the legislature, in seeking for taxes of the same general character in Ireland, should have fixed upon those which in boroughs are universal, and which it has termed "municipal." The decision of the last Dublin Committee has always excited surprise. The tests to try the character of the pipe-water rent were then suggested. None of the arguments in their support, upon that occasion, have been referred to in this case.

A municipal tax must be general and universal in the district within which it is levied. 2. It must be levied for public purposes. 3. It must be a public fund applicable to public objects.

First, this pipe-water rent, is not exigible even within the whole of the circular road. The Earl of Meath's liberty, a considerable district, is exempt from it. 19 & 20 Geo. III. c. 13, (I. A.) s. 22. That section recites that the Earls of Meath, lords of the manor of the liberty of Thomas Court and Donore, had for many ages been seised and possessed of part of the water-course of the river Dodecr. The Earls of Meath and the corporation of Dublin jointly possessed the water course, and therefore the manor of the liberty belonging to the former was exempted from the rate in question not being supplied with water by the corporation. The 28 Geo. III. c. 50, s. 5, excludes the corporation from supplying the liberties of Thomas Court and Donore, though by sect. 6, it is enabled, on a petition from two-thirds of the inhabitants of any street, within the liberty of St. Sepulchre, to lay down pipes to such street. Looking then at a map of the City of Dublin, it is evident that the exempted district is more than equal in area to that which the corporation supplies with water.

[*Committee.*—Is there any power given to compel the corporation to lay down mains?] 1838.

There is no such power. The 19 & 20 Geo. III. c. 13, s. 1, provides that in any streets, in which there is a main, service-pipes shall be laid down; but if the main is taken up, there is no power given to the inhabitants to compel the corporation to replace it.

There is then a large district, within the City of Dublin, exempt from the payment of this rent, and within the district, liable to its payment, all householders are exempt before whose houses main pipes have not been laid down. The payment is only made in cases where there is a supply of water, but in the case of the paving and lighting tax, all householders are liable to it, whether their houses are lighted or not. (1)

Secondly, it is true that the preamble of the various acts recites that this payment is for the public benefit. This is a flourish in all acts, whether they are for the best public objects, or whether they create the greatest public mischief. The extent of the benefit is to be determined by the extent of the enactments. There are no public objects to which this rent is directed to be applied.

Thirdly, this payment for the supply of water is a payment made in respect of the private property of the corporation of Dublin. The 6 Geo. I. c. 16, (I. A.) recites, that the corporation has “for many ages passed been seised and possessed of a water-course taken out of the river Dodeer.” The 15 & 16 Geo. III. (I. A.) c. 24, s. 1, contains a similar recital. With respect to the title of the Earl of Meath to a share in the water-course, the 19 & 20 Geo. III. (I. A.) c. 13, s. 22, recites, in the same lan-

(1) Mr. Keating stated, that there were certain voters beyond the limits of the circular road, not liable to the paving tax. Mr. Austin replied, that the charge and liability was general, within the whole district, over which the authority to levy the tax extended.

1838. guage as the 6 Geo. I. c. 16, recites the title of the corporation, that the Earls of Meath, "have for many ages been seised and possessed of part of the said water of the said river Dodeer." The water-course is divided between two owners; each has an absolute right in each portion. It may be sold, charged, or alienated as private property by either party. The rent payable in the district supplied with water by the Earl of Meath, will not change its character, and become a municipal tax, if he should sell it to the corporation. If the city of Bristol possessed a branch of the river Avon and supplied the city with water, there can be no question, that the payments made in respect of it, would not differ in their nature, from rents paid for the use of other property belonging to the corporation. Until the English Municipal Reform Act passed, such property might have been disposed of without control. A similar power of alienation is still possessed by corporations in Ireland. (1) The relative position of the corporation of Dublin and of the public, is shown by the 15 & 16 Geo. III. c. 24, s. 1, which speaks of the revenue arising "from the sale of water." Can this act be distinguished from any act passed to empower a company to supply a town with gas? The corporation of Dublin, in this matter, is a mere private company, dealing with the inhabitants of Dublin for the sale of water. It has obtained the aid of an act of parliament, as other companies have done, on account of the number of persons with whom it is compelled to deal. The 42 Geo. III. c. 92, (L. & P.) s. 3, confirms this view of the subject. This section, regulating the rates of payment, is similar to that which every act contains, relating to the sale of gas. Section 4 enables the corporation "to contract and agree with every brewer, &c." "for an annual rate or rent for

(1) It has been restrained by the annual acts of 6 & 7 Wm. IV. c. 100; 7 Wm. IV. c. 14; 1 Vict. c. 74, and 1 & 2 Vict. c. 103.

the pipe-water consumed or used by them." Can a man contract or agree for the payment of a public tax? This power to contract shows that this payment is a mere rent; that it is a payment for so much water agreed to be supplied. Again, when the rent is paid, there is no control upon its application. The book in which the payments are entered do not show that it is a rate. It is called the "Pipe Water Rental or Ledger." There is no appeal against it if incorrect, and there is no public check upon it. In one column it contains the name of the street; in another the rental. It is not made up as a rate by rating the occupiers of houses. The book for 1837, was copied from that of 1836, made up in a private room, and produceable only to the employers of the person making it. When the rent is collected, to whom do the collectors pay what they receive? They pay it into the Bank, to the credit of the corporation. When there, it is mixed with the other funds of the corporation, and the corporation is not accountable for its application. It may be paid to provide for public or private dinners or any similar object. It is not laid aside for public purposes, or limited in its application or expenditure to public objects. It is a private rent, falling into the other accounts of rent payable to the corporation, and not a payment that the legislature could have contemplated as a condition connected with the right of voting. In the three essentials of a municipal tax, it is totally wanting.

It was resolved—That the rate or rent collected by the Pipe Water Establishment, was not a municipal rate coming within the 5th section of the Irish Reform Act.

JOSEPH ORMSBY'S CASE.

This voter was objected to upon account of the non-payment of the Paving Tax.

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A rate made by an inspector on an assessment made by commissioners, under a local act, held to be a good rate, though the assessment and the rate were directed in the act to be made by the same authority.

The first question raised related to the validity of the rate under which the tax was to be levied. It appeared that after the commissioners made out the general assessment, or general sum payable, the inspector of taxes, in the treasury department of the paving board, entered in certain books the particular sum to be charged against particular premises, and particular persons. These books were delivered into the treasurer's office, and their entries were inserted in the Tax Ledgers. The collector's books and the Tax Ledgers were then compared, and without any confirmation of the rating contained in them, books to the collectors were issued, directing the collection of particular sums in respect of each house.

Mr. *Roebuck* objected that it had not been shown that there was a legal rate, or that Ormsby was liable to pay the tax. The 47 Geo. III. sess. 2, c. 109, s. 36 (L. & P.) enacts, "that there may be levied and assessed by the commissioners or any two of them, once in every year, or oftener if they shall see occasion, one or more *rate* or *rates*, assessment or assessments upon all and *every* the houses, shops, &c."—"according to the yearly rent, &c." The rate and the assessment upon every house is to be made and sanctioned by the commissioners. Here the rate was made by an inspector without receiving the signature or authority of the commissioners. The rate, therefore, is not legal nor collectable. The 54 Geo. III. c. 221, s. 2, also directs, "that there shall and may be levied by the said commissioners, or any two of them, in lieu of the rates and assessments for such purposes under the 47 Geo. III. once in every year, or oftener if the said commissioners shall see occasion, one or more *rate* or *rates*, assessment or assessments upon all and *every* the houses, &c." This is a power given to the commissioners alone and one which they cannot delegate. All that they did was to make an assessment, by which they deter-

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mined the gross value of the property, upon which a rate should be made. But this was not the whole extent of their duty. Having fixed the assessment, they should have made a rate upon that assessment. *R. v. Aire and Calder Navigation Company*. (1) It could not be said, that the party could have any appeal, under the appeal clauses of the Paving Acts, for there clearly was no rate whatever to appeal against. *R. v. Newcombe*, (2) in which case it was determined that, if a poor-rate be not published in the church on the next Sunday, after it has been allowed by the justices, it is a nullity, and payment under it cannot be enforced although the rate has been confirmed on appeal. No rate has, in fact, been made.

Mr. Keating.—The right of this voter depended upon a condition precedent, namely, the payment of his rates. This condition he has not performed. The Paving Acts referred to, do not give any discretion to the commissioners in the amount of the charge upon each person. The commissioners have simply to fix the sum to be levied, and the act regulates and determines its distribution. 47 Geo. III. sess. 2, c. 109, s. 36. If there had been any irregularity, the voter might have appealed. His neglect to do so, subjects him to pay the rate. *Hutchins v. Chambers*, (3) *Durrant v. Boys*, (4) *Cortis v. Kent Water Works Company*. (5)

The Committee unanimously resolved, that the rate was a valid rate.

It was then objected, that the voter being registered for “a shop and premises, 77, Francis Street,” and one Riley being rated for the house, 77, Francis Street, the voter was not liable to pay the rates for his shop, he not being rated.

A registered voter, not named in the Paving Rate, held not to be liable to pay the rate.

Mr. Thesiger raised several points in the case, but the

(1) 9 B. & C. 820.

(2) 4 T. R. 368.

(3) 1 Burr. 580.

(4) 6 T. R. 580.

(5) 7 B. & C. 314.

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 one upon which the decision rested, related to the liability of the voter to pay the rates due in respect of 77, Francis Street, and which were in arrear more than six months at the time the voter polled.

The 47 Geo. III. c. 109, s. 36, enacts, "that there may be levied one or more rate or rates, assessment or assessments upon all and every the houses, shops, warehouses, vaults, cellars, and tenements, now built or which at any time hereafter may be built." It does not direct that the owners or inhabitants shall be rated. It is sufficient if the houses, &c. are charged. The 54 Geo. III. c. 221, s. 2, makes the same provision. There is no necessity to rate the person, the rate being primarily upon the property. 47 Geo. III. c. 109, s. 44 and 54 Geo. III. c. 221, s. 9 and 10. *Hugh Ample's case.* (1) There is no evidence to show that the shop for which Ormsby is registered, is not the whole of the house. If it is so, he is liable to pay the whole amount of the rate. 54 Geo. III. c. 221, s. 8, and 2 & 3 Wm. IV. c. 88, s. 5. The arrears of the rates, being, therefore payable, by the voter and being unpaid at the time of his being polled, his vote must be struck off.

Mr. Austin.—This Committee is not bound by the decisions of the last Dublin Committee. The voter, it is said, must be struck off the poll, because at the time he gave his vote, he was in arrear of more than one half-year's cesses, rates, or taxes, payable by him in respect of the premises for which he registered, that is, for his shop, he being registered for a shop. Nothing certainly can be more ill-contrived than the 5th section of the Irish Reform Act. Before a man can vote, he must be satisfied that he has paid taxes, in the assessment of which he has no part, of the very existence of which he may be utterly ignorant, and he has to discriminate between taxes that are muni-

(1) *Ante*, 130.

cipal, and those that are not municipal. (1) Suppose this voter had been of opinion that this was not a municipal tax, and that he takes the oath put to him at the poll. His case comes before a Committee which declares it to be a municipal tax, he may be sent to gaol, a judge may address a jury against him, and he may be punished for having voted. It is, therefore, actually necessary that the most rigid rules should be observed in striking a vote off the poll.

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The first answer in this case is, that the voter, Joseph Ormsby, is not named in the rate, and that he is, therefore, not rated. How is he registered? Joseph Ormsby, for "shop and apartments." This is all that appears from the certificate. In the collector's books is the entry, "Rily, 77, Francis Street," the premises partly occupied by the voter, and for which he was registered. On the face then of the rate, the voter is not rated.

If he is not rated, how can any rate be due and payable by him? It is enough, it is replied, if the premises are rated, and there is no necessity to enter the name on the rate. As a matter of fact, Rily, the name of the person charged, as well as the property, are in the rate, and it is necessary that both should appear. Suppose Joseph Ormsby to have been rated at five shillings, and that nothing more had been inserted. This rating would have been a nullity. The property must be inserted or the rate is not recoverable. The name of the party rated, the subject matter rated, and the sum charged must appear. In England, though a rate is chargeable upon the occupier, it is actually necessary to have the subject matter of the assessment mentioned in the rate. Even if

(1) It is even in the power of parties, privately to assess a borough during an election; and thus, if they do not always succeed in the object they have in view (see *ante*, p. 177, 178), they may make the best class of voters hesitate in taking the oath that may be put to them at the poll.

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this rate was merely a charge on the property and not on the person, it would nevertheless be necessary that the name of the party, as well as the property rated, should appear. On principle this should be done. But the act itself requires it. The 47 Geo. III. sess. 2, c. 109, s. 36, enacts, "that the rate or rates, assessment or assessments shall be a charge upon all and singular the said houses, shops, &c. *and* upon the several tenants, owners, or occupiers thereof, respectively." What is the effect of this section? The rate must be made on the premises, and also upon tenant, or owner, or occupier. It is as much a personal charge as the poor-rate is in England. So also, the 54 Geo. III. c. 221, s. 2, and s. 44, clearly recognise individuals to be liable to the rate. A personal assessment was clearly contemplated. The language used is stronger than that contained in the statute of Elizabeth, relating to the poor. The person is to be rated in respect of his property and the name of the person and the property rated must appear in the rate. If J. Ormsby is not in the rate, he cannot tell what he is to pay. The 127th section of the act, gives a right of appeal, "if any person thinks himself to be aggrieved." Who in this case was to appeal? Ormsby or Rily? The former is not named and knows nothing of the rate. Rily is charged, and is he not the only person who can appeal? What is the meaning of the words "the respective parties are to pay upon whom the sums, &c. are assessed." What can be the meaning, coupling these words with the appeal clause, but that the act requires persons as well as property to be rated. If it was sufficient to mention the property, and to omit the name of the person, all the personal references in the act must be treated as a nullity, and the effect of the appeal clause will be destroyed. Ormsby not being named in the rate, is not a person who has been rated or assessed, he is

not a person who can have the benefit of an appeal, and the rate was not due or payable by him. 1838.

[*Lord Seymour*.—Could the commissioners have enforced payment from Ormsby?]

They might have distrained upon the goods of Ormsby, sect. 44. If there were goods on the premises, they might have been taken, because on the premises and upon a sale, the surplus, if any, after deducting the rate due would be paid to the owner of the goods—not to the owner, or the tenant of the house, unless owner of the goods. An action could not have been brought against Ormsby.

[*Committee*.—Who paid the last rate?]

It was paid in the name of Rily. But there is another form in which this case may be put. In the collector's book, is entered, "Rily, 77, Francis Street." This number refers to the house. It is the house that is rated. Now Ormsby could not have been rated for apartments, for with respect to them, he was merely a lodger. He could only have been rated for a shop. But it is evident that the shop was not rated, so that the voter was neither rated by name, nor in respect of subject matter for which he might have been rated. It is admitted, that Ormsby occupies the premises for which he is registered.

It was resolved, that the vote of Joseph Ormsby was a valid vote.

Mr. *Thesiger* stated, that it would assist him, if the Committee would state the questions that they had decided.

Lord Seymour replied, that it had been decided that the voter was not rated; the name of the voter not being in the rate. And a member of the Committee added, that Joseph Ormsby did not owe any taxes at the time of polling.

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JAMES RATTIGAN'S CASE.

There were two questions raised on this case ; 1. Whether a demand of the arrears of the Paving Tax which were due by the voter was necessary in order to disqualify him ; 2. Whether he was in arrear more than six months.

Mr. Keating.—The rate was due and payable immediately that the assessment was made. *Lloyd v. Heathcote*. (1) Before any action at law could be taken, there must have been a demand, but this does not affect the present question. If the arrears were payable, the voter was disqualified without a demand. A voter under the 2 & 3 Wm. IV. c. 88, s. 5, cannot be polled, if six months arrears of taxes are *due* in respect of the premises for which he votes. In England, no barrister would register a person who should excuse his non-payment of taxes because no demand had been made upon him. The law in England, enabling a party to register, is similar in this respect to the law in Ireland enabling a party to vote. The tax was due as soon as the assessment was made. The amount charged was payable immediately. *Cullen v. Morris*, (2) was a case that occurred many years before the Reform Act passed, and related to a very different state of the law to that now prevailing. The party charged with the tax must tender the amount without demand. *Walsh's case*. (3)

Secondly, the assessment was made upon the 2nd of February, 1837, and the election was in August. Under the 47 Geo. III. c. 109, s. 40, the tax for the whole year is due at once. But at all events, one half-year was due on the 2nd of February, and the other half-year in July. In July, the whole was payable. More than six months arrears, were, therefore, payable by the voter at the time

(1) 6 Moore, 137.

(2) C. & D. 131, *ante*, 126.(3) *Ante*, 126.

of the election, he not having paid any portion of the tax at that time for the year 1837.

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Mr. *Austin*.—There has been no demand for this tax made upon the voter, and it has not been shown that there was a collector authorised to demand it. The tax was not collectable until a demand was made, and the demand could not be made until a collector was authorised to make it. There being no demand, the tax was not due and payable. The 2 & 3 Wm. IV. c. 88, s. 5, provides, that not more than one half-year's taxes shall be legally due and payable by the voter at the time of polling. The reference to the payment of taxes in England had no application to this case, because a party may, in England, by possibility be one year and a half in arrear. In England also, a party rated knows all about the rate, but in Dublin he is ignorant of it, and is entirely at the mercy of the commissioners. *Cullen v. Morris* was decided at a time when the law in scot and lot boroughs was, that a man should not vote unless he had paid his rates. This law is now only qualified, and if it even now appears that a demand on a scot and lot voter has not been made, a man may vote notwithstanding the rate is unpaid. The words "at least the second time," in the judgment in that case did not affect the previous language. If the words, "due and payable," in the 36th section of 47 Geo. III. c. 109, were to be taken absolutely, then the tax must always be due and payable on the 5th of January. This is admitted not to be the case. The tax cannot be due and payable until a remedy to recover it exists. In this case there is no such remedy until a demand is made. This was the principle of common law, independent of the statute. The act, also, gives a power of appeal. Could there be an appeal until there had been a demand, and how could a party appeal who knows nothing of the existence of the tax? The 44th section, shows that a demand is absolutely necessary. A voter cannot

1838. neglect or refuse to pay, until a demand is made. The case of *Lloyd v. Heathcote*, was not whether a debt was due without demand, but, whether the money for which the party called, was lawfully due, and the decision was, that the money was lawfully due.

[*Committee.*—How do you distinguish this case from the common case of debt?]

The distinction is, the debtor knows who his creditor is, and what is the amount of the debt, and he is bound to go and pay his debt; but that is not this case, because the party did not know to whom to pay the tax, nor can know of the existence of it until a demand is made.

Secondly, there is no proof of the tax being due, but, on the contrary, there was distinct proof that half-a-year's tax was not in arrear. The nomination took place on the 31st July, and the assessment was made on the 2nd February. The meaning of the 5th section of the Reform Act is, that the voter shall have one half-year's grace; and therefore, even admitting that the whole tax was due on 2nd February, still it would not be sufficient. The 36th section of the 47 Geo. III. c. 109, says, "it shall and may be levied and recovered half-yearly," so that the succeeding half-year could not be due until 2nd August; and as the voter had a right to half-a-year's grace for all taxes that were due for six months preceding the time of voting, he was not disqualified when he polled.

It was resolved, that a demand was necessary to make the tax legally due; and that no more than six months' tax was due.

The Committee finally *resolved*, that the Sitting Members were duly elected, and that neither the petition nor the opposition to it, were frivolous or vexatious.

CASE XXXII.

MALDEN.

This Committee was appointed upon the 3rd of April, 1838, and consisted of the following Members :—

W. B. Brodie, Esq. (Chairman), <i>Salisbury.</i>	
W. Ormsby, Esq.	William Curry, Esq.
<i>Shropshire, N.</i>	<i>Armagh.</i>
Thomas Mackenzie, Esq.	Lord Fitzalan,
<i>Ross & Cromartysire.</i>	<i>Arundel.</i>
Lord Grimston,	James Patteson, Esq.
<i>Hertfordshire.</i>	<i>London.</i>
W. Villiers Stuart, Esq.	Edward Fellowes, Esq.
<i>Waterford County.</i>	<i>Huntingdonshire.</i>
J. J. Bodkin, Esq.	W. H. Lascelles, Esq.
<i>Galway.</i>	<i>Wakfield.</i>

Petitioners—

Electors in the interest of Thomas Barrett Lennard, Esq.

Counsel for the Petitioners—

Mr. Serjeant Merewether, Q. S., Mr. Austin, and Mr. Channell.

Agents for the Petitioners—Messrs. Church and Lawrence.

Sitting Member petitioned against—John Round, Esq.

Counsel for the Sitting Member—

Mr. Thesiger, Q. C., Mr. Hildyard, and Mr. Henry.

Agent for the Sitting Member—Mr. G. W. Digby.

The allegations of the petition upon which Mr. Serjeant *Merewether*, in his opening, proposed to rely, related to the title of certain freemen to their freedom, and to the title of a large number of freemen to be put upon the register, upon account of their not residing within seven miles of the borough of Malden by the nearest road. (1)

(1) This latter part of the case was not gone into, but at the registration in 1838, the decision in the *Youghal case*, *supra*, 395, was acted on, and all those freemen who lived within seven miles, measured in a straight line, were placed on the register.

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JOHN AMBLER'S CASE.

Right of the
children of
freemen, under
the new
Charter of the
borough of
Malden.

In consequence of the corporation of the borough of Malden having fallen into decay, a new charter was granted, dated October 8th, 1810. The object of this Charter was to place freemen and those related to freemen, in the same position as they would have been if the old Charter had continued in operation. It was objected that the voter, John Ambler, would not have been entitled to be admitted to his freedom under the old customs of the borough, and that he was not, therefore, included within the provisions of the new Charter.

The voter's certificate of baptism was dated December 20, 1801. The admission of the voter's father was made March 2, 1811, "William Ambler, of Runsel, Danbury, Essex, husbandman, in right of Sarah Stevens, daughter of John Stevens, five children (two sons and three daughters, William, John, Hannah, Elizabeth, and Sarah) his wife Sarah consenting to his said admission." The voter was admitted on the 21st of July, 1835.

These entries from the books of the corporation were then read: 12 Elizabeth, January 16, "Richard Stride, the elder son of Robert Stride, his father lately deceased, while he lived burgess and freeman of this town, on this day asked that he should be admitted into the liberties of the aforesaid town, because he was born *after* the admission of his aforesaid father, and because it was so found, upon the examination of the rolls of this borough, and, therefore, he is admitted into these liberties without any fine, according to the customs of this borough; and the said Richard has no children; and he was sworn."

"23 Elizabeth. To this court came Thomas Catlin, born within the aforesaid borough, and asked to be admitted into the liberties of the same, and is admitted with

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unanimous consent, and nothing gave as a fine, because that the said Thomas married Agnes, the daughter of Richard Bridge, a freeman, the said Agnes being born *after* the admission of the said Richard, her father, into the liberties of the said borough, and hath two sons, John and another at the time of his admission, and was sworn."

"6 James I. On this day came Stephen Vesey, yeoman, born at Baddow, in the county of Essex, and asked that he should be admitted into the liberties of the borough in his hereditary right, because that the said Stephen was born *after* the admission of his father deceased into the aforesaid liberties."

The following sections of the Charter were those principally referred to in the following argument:—

1. That all and every person, or persons, who was, or were, duly admitted into the freedom of the said borough, before the said corporation had fallen into a state of dissolution and decay:—

2. And all and every person or persons who by the usage and custom of the said borough would have been entitled by birth, or servitude, to his, or their, admission into the freedom of the said borough, and to have been of the commonalty thereof, in case the said corporation had not fallen into a state of dissolution and decay, so as to prevent their obtaining such admission:—

3. And also all and every person, who if such last-mentioned person had been admitted into the freedom of the said borough, would, by the said usage and custom have derived a title to the same freedom, by birth or servitude, from, through, or under them, or any of them, in case the said corporation had not fallen into a state of dissolution and decay, shall and may at any time, within six calendar months from and after the date of these presents, claim and have admission into the freedom of the said borough.

4. And that all the children, or apprentices, of such persons so admitted, by virtue of these presents, shall have the same right, title, and claim to their freedom, and to the power of conferring the same hereafter, as if their respective parents or masters had

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been admitted to their freedom as soon as they would have been entitled thereto, in case the same corporation had not fallen into a state of dissolution and decay.

5. That each and every daughter of every person who was heretofore admitted into the freedom of the said borough, or who shall be duly admitted into the same by these presents, or who being now deceased, or abroad in parts beyond the seas, would be entitled, under these presents, to be admitted into the same, if he were now living, or upon his return into this kingdom, shall have the same right to nominate and appoint her husband to be a freeman of the said borough, as the daughters of freemen possessed before the said corporation fell into a state of dissolution and decay.

6. And that in all cases in which a woman, being the daughter of any person who was duly admitted into the freedom of the said borough, before the said corporation had fallen into a state of dissolution and decay, or of any person who by the usage and custom of the said borough, would have been entitled, by birth or servitude, to his admission into the freedom of the same in case the said corporation had not so fallen into a state of dissolution and decay, hath been married, and hath died before the granting of these our letters patent, leaving her husband and a child or children, or any of them behind her, or being now living and a widow, hath a child or children lawfully begotten, such husband, child, and children shall, respectively, have, enjoy, and be entitled to the same right as he and they would have been entitled to if such woman had, *upon her said marriage, conferred the freedom* of the said borough upon her said husband according to the usage of the said borough and her said husband had been thereupon duly admitted thereto ; provided always, that where such woman shall have married two husbands, the right shall be confined to her children *by her first husband* ; and that all the ancient customs and usages of the said borough, touching the right of admission to the freedom thereof, shall continue and be observed, except so far as they are altered by these presents.

Mr. *Channel*.—This vote of John Ambler ought to be

struck off the poll. In order clearly to show the effect of the evidence it will be necessary to consider, what was the ancient usage of the borough; what are the particular facts connected with the admission of this voter; and lastly, whether or not if, according to the ancient usage of the borough, this voter could have been admitted, he is entitled to be admitted under the new Charter.

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The ancient right of admission, in virtue of hereditary right, was when the son was born after the admission of the father. In the case of admission in the right of the wife, she must have been born after the admission of her father, and her husband must have been admitted with her consent. The voter claims, through his father, in hereditary right, and the father was admitted in right of his wife. In the admission of the father it is stated, that his wife was examined and that they had issue living at the time—William, *John*, Elizabeth, and Sarah. In 1835, John, who was born previous to, and not *after* the admission of his father, was admitted in virtue of an alleged hereditary right. The certificate of baptism confirms the entry of the admission of the father, and establishes beyond all doubt that the ancient usage has not been followed. Is there any thing then in the Charter to support the vote? It grants and confirms “unto the aforesaid mayor, aldermen, capital burgesses, and commonalty of Malden and their successors for ever, all ancient customs, liberties, privileges, franchises, jurisdictions, and all and singular other things whatsoever, in any charter or letters patent, &c. heretofore, given, granted, or confirmed.” It then enumerates particular rights, and at the close of the enumeration adds, “that all the ancient customs and usages of the said borough, touching the right of admission to the freedom thereof, shall be continued and observed, except so far as they are altered by these presents.” The object of the new Charter was to re-establish the ancient rights,

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and to enable such persons to be admitted to their freedom whose right to it had been suspended by the decay of the old corporation—not to entitle those to admission who would have had no right to the freedom, if the old corporation had been in existence. The new Charter relating to admissions, directs that persons admitted before the corporation had fallen into decay—that persons who would have been entitled by birth and servitude to their admission, if the corporation had not fallen into decay, so as to prevent their admission—and that persons, who if such last-mentioned persons had been admitted into the freedom of the borough would, by usage and custom, have derived a title to the freedom by birth or servitude, from, through, or under him, or any of them, in case the said corporation had not fallen into decay, might within six calendar months after the date of the Charter (Oct. 8, 1810), if within the realm and of full age, or if out of the realm or under age, within six calendar months after their return, or becoming of full age, be admitted to the freedom of the borough. Those who had been admitted were confirmed in their title to the freedom; those who would have been entitled by birth and servitude to be admitted before the Charter was granted, were to be admitted; and lastly, those claiming under the first or second class were to be admitted. Now, unless it could be shown, which it cannot, that the father was included in the first or second class, the son cannot claim admission under the third class; and he cannot claim admission under the second class, because, not being born until 1801, he was not of that class, who “would have been” entitled to the freedom when the Charter was granted, and for whose admission the Charter provides. The fourth section of the Charter directs “that all the children and apprentices of such persons so admitted by virtue of these presents, shall have the same right, title, and

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claim to their freedom and to the power of conferring the same hereafter, as if their respective parents or masters had been admitted to their freedom as soon as they would be entitled thereto," in case the said corporation had not fallen into decay. Now, neither the father of the voter nor the voter were "so admitted" by virtue of these presents. The title of the father was by marriage, and therefore, this fourth section, which applies to the foregoing sections relating to persons "so admitted" does not include his children. If the father had been admitted by right of birth or servitude, the claim of the son to the freedom, under this fourth section, would be clear. But this was not the case; the son claims in virtue of an hereditary right though a person not "so admitted," under the preceding sections.

Then follow the fifth and sixth sections. The former provides, that each and every daughter, of every person, who was heretofore admitted to his freedom, or shall be admitted under the new Charter, or who being dead or beyond seas, would be entitled, under the new Charter to be admitted, if he were living, or upon his return to this kingdom, shall have the same right to nominate and appoint her husband to be a freeman, as the daughter of freemen possessed before the borough fell into decay. And the sixth section is, that in all cases in which a woman, being the daughter of any person who was admitted before the corporation fell into decay, or of any person who by usage and custom, would have been entitled by birth and servitude to his admission, in case the corporation had not fallen into decay, hath been married and died before the date of the new Charter, leaving a husband and a child or children, or any of them behind her; or being now living and a widow, hath a child or children lawfully begotten, such husband, child, and children, shall respectively have, enjoy, and be entitled to the

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same right as if, according to the usage of the borough, she had conferred the freedom upon her husband, and he had been admitted thereto; provided that where the woman shall have married two husbands, the right shall be confined to the children of the first husband. This last section does not apply, for the mother of the voter was alive when her husband was admitted. The previous section, the fifth, makes no reference to "children," but merely to the cases of daughters. This is of importance, for the Charter then is confined to those children alone who are mentioned in the fourth section, and they are to be the children of persons "so admitted" under the previous sections. There is, therefore, nothing in the Charter, altering the ancient usage and custom of the borough with respect to persons situated as this voter is, or giving to them new rights. The ancient usage not being followed the right of this voter to his freedom, fails.

Mr. Thesiger.—From 1810 to 1838, this question might have been brought for decision before the ordinary courts of law. No attempt, however, has been made to impeach the legal rights of these voters in any court, and they have voted at every election that has happened since the Charter was granted. It may be admitted, that up to 1757, persons were not entitled to their freedom who were not born before the admission of the father, and the same principle was applied to the rights of daughters. If custom or usage alone applied to this case the vote must be struck off the poll. The case, however, depends upon the intention and the spirit of the new Charter. The borough of Malden having fallen into a state of decay, so that old corporate rights could be no longer exercised, and derivative rights could not be established, a Charter was granted for the purpose of bridging over the interval from the time of the suspension of the corporation to the time of its renewal, giving to all parties the rights that

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they would have had if the corporation had continued to exist without interruption. With this view, it confirms all former franchises, and gives rights which various parties would have possessed, if the old customs and usages had continued in force. Thus, in 1810, many persons could have been entitled by birth to their freedom, if their fathers could have been admitted to the freedom to which they had a claim. But as the father could not be admitted until the grant of a new Charter, none of their sons born before their admission under it would be entitled to their freedom, if the Charter did not grant it to them. It is not, therefore, to the old usages and customs that we are to refer in this case, but to the alterations "made by these presents," that is, under the new Charter. Its object was to put every person in the borough, as far as possible, in the same condition as he would have been if the former state of things had continued. The first section, relating to admissions, refers to persons formerly duly admitted to their freedom. This applies to the old freemen, many of whom were living in 1810. The second section enables persons who had old rights to be admitted. Where such persons were admitted, they gained, not merely personal privileges, but privileges transmissible to their children. But the third section provides for the case of persons who, by birth and servitude, would have been entitled to their freedom, though persons mentioned in the second section, if they had been admitted. So that it is evident, that it applies not to the sons of persons admitted under the second section, but to the sons of persons, who might have been admitted under the second section, and were not so admitted. But it is said that the voter is not within the fourth section, because the father was not admitted by virtue of the Charter. If so, in what right was he admitted? The Charter recites, that persons in his position could not be admitted, and it enables

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admissions to be made. If the father is admitted, it is under the Charter. Then it is provided, that daughters may confer the freedom as they might have done before the borough fell into decay. It is clear that this could only be through the Charter, and why are children to be excluded, when the fourth section states, that the children of persons so admitted by virtue of these presents, shall have the same right, title, and claim, as if their respective parents and masters had been admitted to their freedom, as soon as they would have been entitled thereto, in case the corporation had not fallen into decay. The second section is said not to apply, because the father of the voter had taken up his freedom in right of his wife. But it applies to the children of such persons, who by birth would have been entitled to have been admitted, if the borough had not fallen into decay. The father had an inchoate right, but could not be admitted, the borough being decayed. The children were born and were in the same position. To meet their case the words "would have been entitled" were inserted, referring to inchoate rights such as they possessed. Sarah Ambler, the wife, conferred the privilege on her husband within the six months, so that it may be assumed that she would have conferred it upon the husband in 1801, and thus enabled her children to derive it from him. It is impossible to evade the force of the fourth section "that all children or apprentices of such persons, so admitted, by virtue of these presents, shall have the same right, &c. to their freedom and to the power of conferring the same hereafter, as if their parents or masters had been admitted in case the corporation had not fallen into decay." W. Ambler, the father, was admitted "in virtue of these presents." He could not be admitted, except under the new Charter. The decay of the borough and suspension of corporate rights prevented any other admission. He had a right

that could not be perfected under the former state of things. The same was the case with the voter. When he was born, he could not be admitted. But the effect of the new Charter is to give to him the same rights as he would have had if the father had taken up his freedom at the earliest moment. But the Charter, also, provides, that the husband, child, and children of the daughters of a freeman "shall respectively, have, enjoy, and be entitled to the same right as he and they would have been entitled to, if such woman had, upon her marriage, conferred the freedom of the said borough upon her said husband." It is not confined to the case of conferring the freedom "during marriage," but applies to that of its being conferred "upon marriage," thus clearly giving a right that should extend to the eldest and other sons born before the admission, but confining it to the children of the first marriage. Under these circumstances the right of the voter is clear.

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It was resolved, that the vote of William Ambler was a good vote.

The case of another voter, of the name of Pepper was then taken, who had been admitted to his freedom under similar circumstances to those of *Ambler's case*, but the Committee adhered to their former opinion.

Mr. Serjeant *Merewether* stated that it would greatly assist him in determining the course he should pursue, if the Committee would express some opinion of the grounds upon which their decision had been made.

Mr. *Thesiger* opposed this application as irregular and unheard of.

Mr. *Curry*, however, stated that he had no hesitation to give the reasons of the decision that he had made—speaking for himself alone, but concurring in the decision that had been announced. The general spirit of the Charter was to place all persons in the position that they

Reasons of a
decision of the
Committee
given.

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would have been in, if the corporation had continued to exist without interruption. It was the duty of the Committee to give a construction to the Charter that should effect that object. The father of Pepper had become entitled to his freedom under the fifth clause, having married the daughter of a freeman, and he was of opinion, that the words of the fourth section were not restrained to the three preceding classes, but extended to those mentioned in the subsequent sections. He did not think it right to give to the words "so admitted" a restrictive construction and to confine their application to the three preceding sections.

Mr. Serjeant *Merewether* then stated, upon the part of the Petitioners, they would no longer contest the seat.

In the course of the evidence in *Ambler's case*, Mr. *Thesiger* contended that if the case was to be governed by any provision in the Charter of the borough, it ought to be produced. *Rex v. Powell*. (1)

Mr. Serjeant *Merewether* contended that he was not bound to produce the Charter. *Rex v. Powell* applied to the case of a Charter inconsistent with ancient usages and customs.

It was resolved—That counsel cannot be permitted to proceed with the evidence to establish the old customs, without producing the Charter of 1810, in order to shew to the Committee whether the ancient usages and customs have been preserved.

By the final resolutions of the Committee, the Sitting Member was declared to have been duly elected, and that neither the petition nor the opposition to it were frivolous or vexatious.

(1) 2 Brown's P. C. 298.

CASE XXXIII.

LONDON.

This Committee was appointed upon Tuesday, February 27th, 1838, and consisted of the following Members:—

William Curry, Esq. Q. C. (Chairman), <i>Armagh.</i>	
Richard Saunderson, Esq. (1)	Hon. C. O'Callaghan, Esq.
<i>Colchester.</i>	<i>Dungarvon.</i>
Joseph Brocklehurst, Esq.	Thomas Duffield, Esq.
<i>Macclesfield.</i>	<i>Abingdon.</i>
Frederick Hodgson, Esq.	John Bowes, Esq.
<i>Barnstaple.</i>	<i>Durham, S.</i>
Sir W. L. Young, Bart.	Hon. Arthur Cole,
<i>Bucks.</i>	<i>Enniskillen.</i>
John Fort, Esq.	J. Brotherton, Esq.
<i>Clitheroe.</i>	<i>Salford.</i>

Petitioners—Electors in the interest of Horsley Palmer, Esq.

Counsel for the Petitioners—

Mr. Theaiger, Q. C., Mr. Wrangham, and Mr. Warren.

Agent for the Petitioners—Mr. Gregory.

Sitting Members—

G, Grote, Esq., Sir M. Wood, Bart., W. Patteson, Esq., and W. Crawford, Esq.

Counsel for the Sitting Members—Mr. Austin and Mr. Rushton.

Petitioner to defend the Return—Joseph Travers, Esq.

Counsel for the Petitioner to defend the Return—

Mr. Harrison, Q. C. and Mr. Wood.

Agents for the Sitting Members and Mr. Travers—Messrs. Parkes and Preston.

The petition against the return alleged various grounds of scrutiny, and, also, that the Sitting Members had by themselves and agents, been guilty of bribery and treating.

(1) The Committee met on the 28th of February, 1838, and immediately came to a resolution to adjourn to the following day in order to report to the House a fact which had come to their knowledge. The Chairman reported to the House, that Mr. Saunderson had informed the Committee that he had

1838. The evidence was confined to the latter charges, and it was sought to be proved that Mr. Croucher, by whom the acts of bribery and treating were alleged to have been chiefly committed, was the agent of the candidates. It was proved, that Mr. Croucher attended meetings of the Committee; that the cards of the appointment of clerks were signed by him; that he paid the canvassers; that numerous orders were given by him; that he was a known and recognised manager of the arrangements in favour of the Sitting Members; that the printing was executed by his orders; that he paid the secondary the deposit of 200*l.* towards the usual expenses of the return, and that various other acts incidental to, and necessary for the election were done under his authority. It was, however, resolved, that agency was not proved.

The petition was abandoned in consequence of this resolution. The Sitting Members were declared to have been duly elected, and that the petition against the return, the petition of Mr. Travers, and the opposition to the petition against the return, were not frivolous or vexatious.

voted at the election. Mr. Saunderson made an affidavit of the fact, and was excused attendance.—*Mirror of Parliament*, 1838.

In the *Dublin case* in 1831, a member was left on the reduced list, who had voted at the election. This fact was discovered immediately, and on a division of the House, it was resolved, that the Committee should not be sworn, but that another day should be fixed for a fresh ballot. The division on the question of swearing the Committee was, ayes, 82; noes, 100.—86 *Journals*, 708—709.

CASE XXXIV.

BRISTOL.

The Committee were chosen on the 15th of February, 1838, and consisted of the following Members:—

Charles Wood, Esq. (Chairman), <i>Halifax</i> .	
Nicholas Ball, Esq. <i>Clonmell</i> .	Thomas Marsland, Esq. <i>Stockport</i> .
Right Hon. C. Tennyson D'Eyncourt, <i>Lambeth</i> .	William Curry, Esq. <i>Armagh</i> .
Edward Stanley, Esq. <i>Cumberland, W.</i>	George Wilbraham, Esq. <i>Cheshire, S.</i>
Sir Charles H. Coote, Bart. <i>Queen's County</i> .	R. Etwall, Esq. <i>Andover</i> .
W. Gibson Craig, Esq. <i>Edinburgh Co.</i>	W. B. Brodie, Esq. <i>Salisbury</i> .

Petitioners—Electors.

Counsel for the Petitioners—Mr. Thesiger, Q. C. and Hon. J. Talbot.

Agents for the Petitioners—Messrs. Dyson and Hall.

Counsel for the Sitting Member—

Mr. Cresswell, Q. C., Mr. Adolphus, and Mr. Austin.

Agents for the Sitting Member—Messrs. Fladgate, Young, and Jackson.

The petition complained of bribery and treating, and of the improper admission and rejection of voters—the numbers at the close of the poll were:—

Mr. Miles - - - 3338

Mr. Berkeley - - - 3212

Mr. Fripp - - - 3156

The lists of the Petitioner's objections contained upwards of 1000 names, and were divided into thirty-four classes, the lists of objections on the part of the Sitting Member were exceedingly voluminous and contained up-

1838. wards of 1600 names, many of these names were repeated more than once, but there were said to be upwards of 1000 different voters objected to. The objections in the lists of the Sitting Members were not divided into classes, but the various objections were written opposite each name. If the scrutiny had been entered upon, great inconvenience and embarrassment must have arisen from the mode in which these lists were prepared.

The only part of the case, which was entered upon was a charge of personal bribery against the Sitting Member. The evidence was very contradictory, and the Committee were not called upon to give any decision on the case, as the Petitioners withdrew from the contest soon after the examination of the principal witness had closed.

CASE XXXV.

GREAT YARMOUTH.

This Committee was appointed upon April 26th, 1838, and consisted of the following Members :—

Edward Baker, Esq. (Chairman), <i>Wilton.</i>	
William Bird Brodie, Esq. <i>Salisbury.</i>	George Rushout, Esq. <i>Evesham.</i>
Hon. W. H. Ashe A'Court Holmes, <i>Isle of Wight.</i>	Robert Henry Hurst, Esq. <i>Horsham.</i>
Lord Marcus Hill, <i>Evesham.</i>	John Ennis Vivian, Esq. <i>Truro.</i>
George Byng, Esq. <i>Middlesex.</i>	Joseph Bailey, Esq. <i>Sudbury.</i>
Hon. E. Harbottle Grimston, <i>St. Albans.</i>	Henry Thomas, Esq. <i>Kinsale.</i>

Petitioners—Electors.

Counsel for the Petitioners—Mr. Serjeant Merewether and Mr. Wrangham.

Agent for the Petitioners—Mr. Baker.

Sitting Members—Charles E. Rumbold, Esq. and William Wilshere, Esq.

Counsel for the Sitting Members—

Mr. Thesiger, Q. C., Mr. Austin, and Mr. Cockburn.

Agent for the Sitting Members—Messrs. Fladgate, Young, and Jackson.

The petition was presented by certain electors of the borough of Great Yarmouth, and contained allegations of gross, profligate, and extensive bribery against the Sitting Members, that the return was obtained through bribery and treating, and that illegal, fraudulent, corrupt, and unconstitutional practices were carried to such a scandalous height and were of a nature so flagrant and extensive, as to deprive the late election of any claim to the character of a fair and unbiassed choice of representatives by the

1838. electors of the said borough, and to assimilate it to an open and corrupt purchase of their seats by and on behalf of the Sitting Members. It was prayed, that the election and return of Charles Edmund Rumbold and William Wilshire might be set aside, and that a new writ might be forthwith issued for the election of members to serve in Parliament for the said borough, in lieu of the said Sitting Members, and that the House would take the facts and circumstances, stated in the petition, into their serious consideration, and would grant such other, and further relief to the Petitioners, as to the wisdom of the House should seem meet.

Mr. Barthe, the returning-officer and late mayor of Yarmouth, was called and produced the poll-books. Mr. *Thesiger* cross-examined the witness with reference to corrupt acts, suggested to have been committed during the election by the unsuccessful candidates or their agents. (1)

Mr. *Wrangham* objected to the course of examination that was about to be entered into. The petition is from electors of Great Yarmouth, not from the unsuccessful candidates, nor upon their behalf. It contains no prayer for the seat. Nothing is asked for, upon the part of the unsuccessful candidates and they have no interest in this inquiry. The case is entirely between the Petitioners and the Sitting Members. If corrupt acts were committed by other parties, an investigation into them would be irrelevant to the matter of this petition. *Rogers on Election Law*; (2) *Galway case*. (3) It is only in cases in which the seat is prayed for, or the unsuccessful candidates are Petitioners, that recriminatory evidence can be given.

Mr. *Thesiger*.—The object of my examination is to enable the Committee to arrive at a knowledge of all the

(1) See P. & K. respecting the cross-examination of a returning-officer, 352, n. K. & O. 339, and F. & F. *ante*, 470.

(2) P. 100.

(3) P. & K. 518.

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circumstances of the late election. The form of the petition cannot limit the inquiry. It is the bounden duty of the Committee to investigate all the particulars of the return. In the *Dublin case*, (1) the Committee excluded recriminatory evidence against the unsuccessful candidates and upon their being seated, the House refused to entertain a petition against them, on the ground that the Committee might have gone into recriminatory charges. This case has established the law upon this question. (2) (*Chairman*.—In that case the Petitioners prayed for the seat.) There is a case in which the petition contained no prayer for the seat, yet the Committee seated the unsuccessful candidates. If that result should happen in this case, on the presentation of a cross petition, the House would say, “you have lost your opportunity of showing that the party who is seated was disqualified and you are entitled to no assistance.” All the matters connected with the return are within the jurisdiction of the Committee. The seat is not asked for, but it is prayed, that the return may be avoided and that the House will take the facts and circumstances of the case into its consideration. How can this prayer be complied with but through a special report, and will the Committee make a special report, looking only at the proceedings affecting one party and refusing to hear the particulars of the entire case? By the 9 Geo. IV. c. 22, s. 41, the Committee is empowered to report other resolutions than those declaring the result of the election. All the proceedings affecting the return come within its consideration. In the *Evesham case*, (3) Sir Robert Peel was of opinion, that it was not merely within the power of the Committee, but that it was its duty to investigate all the circumstances connected with the validity of the return.

(1) *Ante*, p. 118, 204.(2) *Mirror of Parliament*.(3) *Ante*, p. 531.

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Mr. Wrangham.—In all the cases cited there was a contest for the seat. The *Galway case* is unanswered. We distinctly disclaim any intention to ask for a special report, and it is only when a way is opened to a Committee that a special report is made.

It was resolved—That the counsel for the Sitting Members were not at liberty to recriminate against the unsuccessful candidates.

The petition was abandoned, and no further evidence was offered after this resolution was made.

The Committee determined, that Charles Edmund Rumbold, Esq. and William Wilshere, Esq., were duly elected burgesses to serve in the present Parliament for the borough of Great Yarmouth, and that neither the petition, nor the opposition to it, were frivolous or vexatious.

CASE XXXVI.

MAIDSTONE.

(FIRST PETITION.)

This Committee was appointed upon May 31st, 1838,
and consisted of the following Members :—

Right Hon. Sir John Cam Hobhouse, Bart. (Chairman), <i>Nottingham.</i>	
Lord Ernest A. C. B. Bruce,	Sir Charles Brooke Vere,
<i>Marlborough.</i>	<i>Suffolk, E.</i>
W. Villiers Stuart, Esq.	Henry Thomas, Esq.
<i>Waterford Co.</i>	<i>Kinsale.</i>
Sir Charles Lemon, Bart.	John Easthope, Esq.
<i>Cornwall.</i>	<i>Leicester.</i>
John Power, Esq.	F. B. Beamish, Esq.
<i>Waterford Co.</i>	<i>Cork.</i>
C. Frederick A. C. Ponsonby, Esq.	Earl Jermyn,
<i>Poole.</i>	<i>Bury St. Edmunds.</i>

Petitioners—Electors.

Counsel for the Petitioners—Mr. Austin and Mr. Cockburn.

Agent for the Petitioners—Mr. Coppock.

Sitting Member—John Minet Fector, Esq.

Counsel for the Sitting Member—

Mr. Thesiger, Q. C., Hon. John Talbot, and Mr. Warren.

Agents for the Sitting Member—Messrs. Dyson and Hall.

The petition alleged that John M. Fector by himself, his agents, friends, managers, partisans, and others on his behalf, before and at and during the election, was guilty of bribery and corruption of the electors of the said borough, in order that he the said J. M. Fector might be elected to serve in parliament for the borough of Maidstone, and did by money, gifts, &c. corrupt and procure, &c. to give their votes at the said election for the said J. M. Fector, and to refuse and forbear to give their votes to Abraham Wildey Robarts.

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That the said J. M. Fector, before and during the said election and after the issuing of the writ which caused or commanded the said election, did by himself, his agents, &c. give and allow to divers persons having a right to vote for the said borough at the said election, money, meat, drink, entertainment, and provisions, and made presents, gifts, rewards, and entertainments, and promises, and agreements, and engagements, to allow money, meat, &c. to and for persons having, &c. and to and for the advantage, benefit, emolument, profit, and preferment to such persons in order to his the said J. M. Fector being elected a burgess to serve in parliament.

That gross, notorious, extensive, and systematic bribery, and corruption was resorted to and practised by the said J. M. Fector, and by divers persons in his interest and on his behalf, at the said election, and that the return was procured by means of bribery, treating, and other corrupt and illegal practices.

And it was alleged, that the said J. M. Fector by the said corrupt and illegal practices, was wholly incapacitated to serve in the present parliament for the said borough and that the return was wholly null and void.

It was prayed, that the election and return might be declared to be null and void—but the seat was not prayed for.

Mr. *Austin*, in opening the petition, stated, that Mr. Fector was charged to have been, by himself and his agents, guilty of bribery, and also, that the election was procured by means of bribery and corruption. In the legal consequences of the two allegations there was an important difference. If the Committee should resolve, that Mr. Fector had, by himself or by his agents, been guilty of bribery, he would be rendered incapable of sitting again in the present parliament. If, upon the other hand, the Committee should resolve, that the evi-

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dence did not warrant that conclusion, and yet should be satisfied that the election was procured by means of bribery and corruption, the effect would not be the less to avoid the election, but there would be no particular consequences attaching to Mr. Fector personally in consequence of such corruption.

Evidence was then given to establish certain acts of bribery, and in the course of it, Mr. *Thesiger* contended that it could not be continued until agency was proved. After hearing counsel it was resolved—

“That it is the opinion of this Committee, that agency must be proved previous to going into any evidence relative to bribery.”

“That evidence having been produced to fix the character of agent on Mr. Potts, it is competent to Mr. *Cockburn* to proceed with his present course of examination.”

The next day, Mr. *Talbot* stated that in consequence of the resolution of the Committee respecting Mr. Potts, that the defence of the return would not be continued.

In the course of the proceedings, Mr. *Austin* asked a witness (Randall) this question:—“You say you do not know who had the pecuniary management of the last election of Mr. Fector—do you know who had the pecuniary management of the former, at the general election?”

Mr. *Thesiger* objected to this question. There is no authority to show that what occurs at a prior election can be given in evidence, unless it immediately and directly relates to the election in question. (1) The inquiry in this case is wholly irrelevant to the case before the Committee.

Mr. *Austin*.—Whether or not proceedings of a former election are relevant or not, depends upon the circumstances of the case. In this case the parties conducting

(1) *Hull case*, K. & O. 427. *Penryn and Falmouth case*, K. & O. 443.

was not duly elected a burgess to serve in parliament for the borough of Maidstone.

That the last election was a void election.

That the petition and the opposition to frivolous or vexatious.

(1) *Ante*, 473, 474.

CASE XXXVII.

MAIDSTONE.

(SECOND PETITION.)

This Committee was appointed upon Tuesday, July 17th, 1838, and consisted of the following Members:—

Sir George Rose, (Chairman), <i>Christ Church.</i>	
Marquis of Douro,	Lord Charles Fitzroy,
<i>Norwich.</i>	<i>Bury St. Edmunds.</i>
Thomas F. Martin, Esq.	Lord Norreys,
<i>Galway.</i>	<i>Oxfordshire.</i>
Lord Viscount Alford,	Lieut.-Col. Robert Rushbrooke,
<i>Bedfordshire.</i>	<i>Suffolk, W.</i>
Robert Otway Cave, Esq.	Kedgwin Hoskins, Esq.
<i>Tipperary.</i>	<i>Herefordshire.</i>
Capt. Henry G. Boldero, R. N.	Frederick Hodgson, Esq.
<i>Chippenham.</i>	<i>Barnstaple.</i>

Petitioners—

George Beacon and others, Electors in the interest of Mr. Roberts.

Counsel for the Petitioners—

Mr. Hill, Q. C., Mr. Cockburn, and Mr. J. Hind Palmer.

Agent for the Petitioners—Mr. Northhouse.

Sitting Member—John Minet Fector, Esq.

Petitioner admitted to defend Return—Joseph Benstead.

Counsel for the Sitting Member and for J. Benstead—

Mr. Thesiger, Q. C., Mr. Austin, and Hon. J. Talbot.

Agent for the Sitting Member and for J. Benstead—Messrs. Dyson and Hall.

Mr. Hill.—The prayer of the petition presented against the return of Mr. Fector, at the last election, did not ask for the seat. It was simply prayed, that the return might be declared to be void. That petition contained three allegations; two charging Mr. Fector, or his agents, with acts of bribery and treating, and the third, being a general charge, that corrupt and illegal practices were generally

1838. resorted in the borough of Maidstone, in order to procure the return. The evidence given before the Committee upon that petition, related to the proof of the agency of a person of the name of Potts, who was fixed with the character of agent. Upon his agency being proved, the defence of the seat was abandoned, and the election was declared to have been void. It is now, therefore, contended that Mr. Fector was disqualified to offer himself as a candidate at the last election. If the Committee had, by an express resolution declared the previous election to be void on the grounds of bribery and treating, committed by Mr. Fector or his agents, Mr. Fector would have been clearly disqualified, for it is an indisputable principle of election law, that where the return is vacated in consequence of the corrupt acts of a successful candidate or of his agents, there is a disqualification worked which will operate against the candidate at the next election—it may operate beyond the next election—but it is sufficient in this case to say, that it will operate against him at the next election. He cannot present himself to fill the vacancy which has been declared in consequence of his own acts or those of his agent. In this case, it may, perhaps, be said, that the grounds of the avoidance of the former election not being stated in the resolutions of the Committee, no personal disqualification was created. It is true that in some cases, the grounds of avoidance of an election are registered, but where the grounds of the avoidance can be proved, though not registered in the resolutions or the report of the Committee, the same effect is produced as if they were registered. There are no conflicting authorities upon this question. Where it can be clearly proved that the resolutions of a former Committee proceeded on the ground of a disqualification, which would extend to a future election, it is immaterial if the resolutions of the Committee state that ground or not. If

they can be shewn to be founded upon the evidence of acts done by the party who is unseated, or by his agents, which, if specially reported, would disqualify him to supply the vacancy that is created, this will be sufficient in order to support the disqualification, though no special report was made. 1838.

The poll-books, the petition presented against the former return of Mr. Fector, and the minutes of evidence in the former case were put in.

Mr. *Hill* proposed to give evidence of notices of the alleged disqualification of Mr. Fector, having been served upon the electors who voted for him at the last election.

Mr. *Austin* objected. In the *Belfast case*, the disqualification of the candidate was first determined, and then evidence was given of the service of notices of disqualification. If it should be declared, that there was no disqualification, there will be no necessity to enter into the consideration of the effect of these notices. The shortest course will be, to proceed with that part of the case to which the evidence that has been given relates. The whole case may be included in it.

Mr. *Hill* contended, that he was entitled to conduct the case in whatever way it might appear to him to be proper.

Committee.—Counsel will proceed with the case in his own way.

It was then agreed, that the evidence relating to the notices should depend upon the determination of the question relating to the disqualification of Mr. Fector.

Mr. *Cockburn*.—The simple question is, if Mr. Fector was disqualified to be a candidate at the last election, and this question depends upon the effect of the proceedings upon the former petition. Upon the charges in that petition affecting Mr. Fector personally, it was resolved, that agency ought to be proved before evidence was given relative to acts of bribery. By this resolution it is clear that

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the general charge against the borough was not gone into. The evidence was confined to the charges personally affecting the Sitting Member. The general charge against the borough was stopped by the Committee, until the personal charges were disposed of, Mr. Thesiger stating at the time, that if the general charge against the borough was gone into, it ought to be at the public expense and not at the expense of the party against whom no personal charge could be sustained. The case proceeded, and upon a question being objected to, the Committee resolved, that it might be put, evidence having been produced to fix the character of agent on Potts. In consequence of this resolution, the seat was abandoned. Now there can be no question, that if a special report had been made, that Potts having as an agent of Mr. Fector, committed an alleged act of bribery, Mr. Fector would have been disqualified to stand again. The finding would have been conclusive and it would not have been open to him to have questioned the resolution. The Committee would be bound, and are bound, to take the resolution of the former Committee as conclusive. It is not matter of fact, but of record, and it is not open to any argument that the evidence in a former case was insufficient. The former Committee resolved, that agency ought to be proved as the first step to establish the charges affecting Mr. Fector personally; then that the agency of Potts was established, and lastly, they declared the seat to be void, in consequence of the counsel for Mr. Fector declaring that the establishment of the agency of Potts might render the further defence of the seat unavailing. What then was the effect of these resolutions? By confining the parties to the proof of agency, the Committee delayed the consideration of the general allegation of the petition against the borough. Upon the agency being proved the defence of the seat was abandoned; in other words, the allegations

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affecting Mr. Fector with personal consequences were admitted by him and the election was annulled. Can there be a doubt then for what reasons the seat was voided? A member of parliament when once duly elected is unable to resign; he has a burthen cast upon him which he cannot reject. He cannot come before a Committee and say that he resigns the seat. The Committee could not treat a proposal to them to declare the seat void as one of resignation. They had no power to do otherwise than to adjudicate. If a member withdraws his defence, he admits the charges made against him, and if that withdrawal is made under circumstances which enable the Committee to come to any resolution, the resolution they come to must proceed upon the allegations of the petition. What then were the allegations upon which the voidance of the seat was declared? Not the general allegation against the borough, for this the Committee declined to hear until the personal charges against Mr. Fector were proved. What were the other allegations? Those only of bribery and treating. It was to establish this charge of bribery that evidence of the agency of Potts was given, and if the charge had not been such as would be followed by personal consequences, there would have been no necessity to have proved that agency, or for the Committee to have required it to be proved. One witness, it is true, was asked respecting certain breakfasts, but not for the purpose of proving treating. The question was put as part of the proof to establish agency. As a matter of fact then it is inconceivable that any other inference can be drawn, than that it was for bribery and for bribery alone, that the seat was vacated. The effect of a general resolution, declaring the seat void under such circumstances, has been set at rest by cases that were decided at a time, when the Grenville Act was considered to work well, and when Committees were not subject to the imputations to which of late

1838. they have been exposed. In the first *Canterbury case*, (1) Mr. Baker and Mr. Sawbridge were returned, and against their return one Callaway and fifty other electors, in the interest of Mr. Gibbs and Mr. Honeywood, the unsuccessful candidates, petitioned, charging the Sitting Members with bribery, treating, and other corrupt and illegal practices. Evidence was gone into at considerable length, and the fact of bribery and treating was established and brought home to all the four candidates. The election was declared to be void, but no special report was made. At the next election the same parties were again candidates, and Baker and Sawbridge were again returned. A petition was presented setting forth the proceedings of the former Committee, and that the Sitting Members having offended against the standing order of 1677 (2), and the act of the 7 Wm. III. c. 4, by gross bribery, treating, and corrupt practices, were by reason thereof, ineligible to represent the city of Canterbury on such renewed election. It was resolved, after argument, "that the Committee who were appointed to consider the former petition of John Callaway and others, having declared the election of John Baker, Esq. and Samuel Sawbridge, Esq. void, (the said petition containing no other allegations than of bribery and corrupt practices) it is the opinion of this Committee, that the said election was declared void for bribery and corrupt practices only." The Sitting Members were then declared not to have been duly elected. There was no special resolution against the candidates or their agents in the first case, and there was a withdrawal of the parties in that case, as there was upon the last petition against Mr. Fector. The state of facts did not vary from those that have been presented to this Committee. The opinion of counsel was taken upon the eligibility of Messrs. Baker

(1) Clifford's R. 355.

(2) See *Evesham case*, ante, 512, 513.

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and Sawbridge, previous to their standing the second time, and Mr. Plumer, afterwards Master of the Rolls, Mr. Dallas, afterwards Chief Justice of the Common Pleas, and Mr. Abbott, afterwards the Chief Justice of the King's Bench, were all of them of opinion that under the general resolution of the first Committee, they were rendered ineligible to be re-elected. (1) In the *Honiton case*, (2) in the year 1780, Sir G. Yeonge and Mr. M'Leod had been returned for the borough of Honiton. The return of Mr. M'Leod was petitioned against on the ground of bribery alone. The Committee came to a resolution that he was not duly elected, but made no special report against him. A new election took place and M'Leod was again returned. Upon the hearing of the petition presented against his re-election, it was contended, that the former return had been avoided for bribery, and that Mr. M'Leod was ineligible to supply the vacancy that had in consequence arisen. It was resolved, "that the Committee who were appointed to consider the former petition (describing it) having declared the election of Alexander M'Leod, Esq. void (the said petition containing no other allegations than of bribery and corrupt practices), it is the opinion of this Committee, that the said election was declared void for bribery and corrupt practices only," and "that the said Alexander M'Leod was not eligible to fill the vacancy occasioned by the said resolution." Between these cases and the present one there is an extraordinary coincidence. The finding in them was to all intents and purposes the same as the finding upon the last Maidstone petition. The vacancy that followed in both cases was similar, namely, there was no legal election upon the first return, and the parties named in the first return were disqualified to be returned a second time. "When a vacancy

(1) See these opinions, K. & O. 19, n.

(2) 3 Lud. 162.

1838. once occurs whether in consequence of a dissolution, the death of a former member, or any such cause, the seat, in the eye of the law, continues vacant, and the original writ is in force until a valid and legal election has been made; and it matters not, how many invalid elections may intervene; because the writs issuing in such cases are to be considered in the nature of an *alies* or *pluries* writ, referable still to the original writ, which remains unsatisfied until a good and sufficient return has been made." (1) The disqualification declared to exist upon the first return extends to the next election and remains in operation until the original writ is satisfied. It will probably be contended that treating, as well as bribery, was alleged in the former petition.

[Mr. *Thesiger*.—We shall not raise any distinction between bribery and treating as grounds of disqualification.]

It may be admitted that there are cases, in which the first petition containing allegations other than those of bribery and treating, which, if established, would have produced no personal disqualification, (2) left it open to the Committee, upon the second petition, to construe the general resolution of the former Committee *in mitiori sensu* and to treat it as having reference to the charges which would produce no personal disqualification. Such cases do not contradict those of *Honiton* or of *Canterbury*. If there were circumstances in the former case, upon which Mr. Fector could have been unseated, independent of bribery and of treating, there would be reasons to infer that he was unseated in consequence of them. But it is impossible to say, that any such existed.

Evidence might be given, even now, in support of the

(1) C. & D. 249.

(2) See the second *Dungarvon* case, K. & O. 27, which was considered to have been decided upon the fact of the petition upon the first election having contained other charges than those of bribery.

charges of bribery in the first petition, but it is sufficient, if it is shown to the Committee, that the resolution declaring the seat void, depended upon the establishment of those charges.

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Until the writ was satisfied, Mr. Fector was incompetent to be elected. The influence of the former corrupt practices would continue to operate in his favour, and he cannot be permitted to go to a new election with the advantages of it. When Mr. Smith and Mr. Hollis were brought up before Lord Mansfield, to receive the judgment of the Court of King's Bench, for bribery in the borough of Hindon, Mr. Serjeant Davey stated, in mitigation of punishment, that Mr. Smith had a few days before been re-elected by a great majority of votes, and that there was not the least shadow of or pretence of any charge of bribery at that election. But Lord Mansfield interrupted him and said, "And do you think, Brother Davy, that it mends your client's case, that he had the impudence to return a second time to the scene of his offences, and has reaped the fruits of his former corruption?" (1) The successful issue of a second contest can afford no excuse for the corrupt practices of a former election.

Mr. Thesiger.—The Petitioners in this case allege that Mr. Fector was disqualified to be elected by reason of bribery and treating committed by him, or his agents, upon a former election. They make this as an accusation, and they are bound to prove it to the satisfaction of this Committee. They may prove it either by substantive evidence, or they may prove that such evidence was given upon the former occasion as establishes the disqualification. It was competent to them to show before this Committee, by substantive evidence, that Mr. Fector, by himself or his agents, was guilty at the former election of bribery, and

(1) Clifford's R. 185. 4 Lud. 286.

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any act that took place at that supposed election might have been given in evidence in support of this petition. This they have not chosen to do. They say that bribery was committed at the last election.

[*Mr. Cockburn.*—It is the common form.] The case stands upon the effect of the resolution declaring the former election void. There is no doubt that if an act is committed by a party himself, or by his agent, the law regards it to be done by him, and entails upon him the consequences of it. But those who make a charge founded upon any act producing penal consequences are bound to establish it. The presumption of the law is against those who make the accusation. Now the resolution of the former Committee proves nothing. It is in general terms. It may be conceded that if a specific resolution against Mr. Fector had been made, no matter upon how slight or unsubstantial grounds, he could not have stood again. Such a resolution could have created no doubt of its intention, or of its effect. The grounds upon which it would have proceeded would have appeared upon the face of it. But the resolution of the former Committee was in general terms, and therefore, it has been necessary to ascertain its meaning and effect by a reference to the petition. Now there were three allegations in that petition. 1st. Bribery by Mr. Fector or his agents. 2nd, Treating by Mr. Fector and his agents. 3rd, General and systematic bribery and corruption, not charged against Mr. Fector or his agents. On the last of these allegations the return might have been avoided, but none of the personal consequences would have arisen, that would have followed the establishment of the other allegations. This was clearly stated by Mr. Austin in opening the former case.

What act of bribery then has been shown to have been proved? The minutes of evidence contain no evidence of

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such an act. When Mr. Fector abandoned the defence of the seat he left the Committee to the facts that they had heard, and they considered that there was sufficient in those facts to justify them in declaring the election void. But who are to prove the grounds of that resolution? The Petitioners ought to point out the passages in the former evidence, showing that Mr. Fector or his agents, were guilty of corrupt acts. Have they done this? No. In the *Honiton case*, acts of bribery were distinctly proved. There was distinct evidence before the second Committee, proving the disqualification of the Sitting Member. In the *Canterbury case*, it is distinctly stated, "that the fact of bribery and treating was established and brought home to all the four candidates." The minutes of evidence in these cases clearly explained the resolution. There could be no doubt on what grounds the previous vacancy had occurred. But where is the slightest evidence to prove that Mr. Fector was guilty of bribery or treating, or evidence of any fact proving a ground of disqualification against him?

Mr. *Thesiger* concluded by asking for costs.

Mr. *Hill* contended, that if there was any intention to raise a question respecting costs, he ought to be heard upon it.

The room was cleared and the Committee *resolved*—that Mr. Fector was not disqualified at the last election.

Mr. *Thesiger* then asked, that the petition might be declared to be frivolous and vexatious.

Mr. *Hill* applied to be heard against the application.

Col. Rushbrook.—The question depends upon the merits of the case, and they are already before the Committee.

Mr. *Hill* cited the *Ipswich case*. (1)

The room was cleared and the Committee *resolved*—

(1) K. & O. 372.

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that counsel should be heard upon the question, whether the petition was frivolous or vexatious, or not.

Upon this resolution being announced, Mr. *Hill* addressed the Committee upon the facts of the case in justification of the presentation of the petitioned, and contended that the Petitioners were fully justified in asking for the opinion of a Committee upon the eligibility of Mr. Fector to have been returned.

Mr. *Thesiger* was heard in reply.

The Committee *resolved*—That John Minet Fector, Esq. is duly elected a burgess to serve in this present Parliament for the borough of Maidstone.

That the petition of George Beacon and others did appear to the Committee to be frivolous and vexatious.

That the opposition to the said petition did not appear to the Committee to be frivolous or vexatious.

That the opposition of Joseph Benstead, who had been admitted a party with the Sitting Member to defend the return did not appear to be frivolous or vexatious.

Note.—The following case which arose out of this resolution of the Committee, illustrates the difficulties attendant on the proceedings for the recovery of the costs of a petition which has been reported frivolous and vexatious.

FECTOR v. BEACON.

Mr. *Thesiger*, Q. C. obtained a rule in the Common Pleas in Michaelmas Term, 1838, for entering up judgment in favour of the plaintiff under 9 Geo. IV. c. 22, s. 63, on affidavits which set forth the Speaker's certificate, writ, declaration, particular of demand, and other proceedings. (1) It was stated in the certificate of the Speaker, dated 6th August, 1838, that the costs of the petition had been taxed at 620*l.* 15*s.* 10*d.*, and that the defendant, George Beacon and five other persons, all of whom had signed the petition were liable to pay the costs.

Mr. Serjt. *Wilde*, Q. S. and Mr. *Cockburn* showed cause upon an affidavit (2) the object of which was to show that part of the taxed costs were those of

(1) The substance of the affidavits is given at length in the report of the case in 5 Bing. N. C. p. 302.

(2) For a full statement of this affidavit, see 5 Bing. N. C. 306.

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Joseph Benstead, who had been admitted a party to defend the return of Mr. Fector : that the demand which had been referred to the taxing officers by the Speaker was on account of Mr. Hart against all the six petitioners named in the Speaker's certificate. That Mr. Hart was not parliamentary agent for any of the parties, nor was he a petitioner, party, witness, or officer. It was also stated, that five other separate actions had been commenced by the same plaintiff against the other petitioners for the recovery of the same costs.

Three objections were taken to the right of the plaintiff to enter up judgment under the statute.

1st. It was contended that there had been no application by an authorised party, and that the Speaker could not *ex mero motu* make the order. The mode in which the amount to be paid is ascertained is quite anomalous, the examiners sit in a private room, they are subject to no controul, and there is no appeal from their taxation. The only protection which a defendant has, consists in the superintendence of the Court when judgment is moved for. The jurisdiction given to the Speaker by the statute is in derogation of the common law, and all proceedings under it, in order to be valid, must strictly and accurately pursue the statutory authority. The jurisdiction conferred by the statute was said to be analogous to the power of summary convictions given to magistrates, and many authorities were cited to show the particularity insisted on by the Courts in cases of summary conviction. The statute requires that the application to the Speaker should be by the petitioner, party, witness, or officer concerned. It was contended, that a stranger could not put the Speaker in motion, *R. v. Daman*, (1) and the affidavits were referred to in order to show that the application had been improperly made.

2nd. The certificate is invalid for having included the costs of Benstead in the same sum with those of Fector. In *Strachey v. Turley*, (2) two petitions against the same return had been reported frivolous and vexatious, and the Speaker certified a joint taxation of costs against both petitioners, which was held not warranted by 28 Geo. III. c. 52. Where there are two parties before the House, coming in under several rights, their costs cannot be taxed together. Where the parties are all in the same interest, it by no means follow that there is the same case applicable to them all. The personal conduct of the elector may have been very different from that of the Sitting Member, and the costs of one may materially differ from that of the other. If the present mode of taxation is proper and entitles Mr. Fector to a certificate for the whole amount, the same reason would also entitle Mr. Benstead to a similar certificate for the whole amount.

3rd. By 9 Geo. IV. c. 22, s. 3, the Speaker's certificate is to have the same effect as a warrant of attorney to confess judgment. Now a joint warrant of attorney by several persons does not operate as an authority to sign judgment against any number less than the whole. *Row v. Alderson* (3); *Gee v. Lane*. (4) Hence the present action should have been brought against all the petitioners as joint defendants. It is enacted by sect. 63, that the party entitled may bring an action having made a demand on any one or more of the parties

(1) 2 B. & Ald. 378.

(2) 7 East, 507.

(3) 7 Taunt. 453.

(4) 15 East, 592.

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liable : but as in this case there is a joint report, although the demand may be made against one the action must be against all. In *Gordon v. Gurney*, (1) there was a separate report against the petitioner, on which report the petitioner was the only person liable, and the point there decided was that there might be separate reports. Here there is one joint report including the names of six petitioners, and six separate actions have been brought, in each of which the whole sum mentioned in the report is sought to be recovered.

Mr. *Thesiger* and Mr. *Channel* in support of the rule. 1st. There is no weight in the third objection which has been taken on account of the action having been brought against one only of the parties named in the certificate as liable to pay instead of against all. Assuming that the certificate of the Speaker was valid, the declaration is right and the judgment prayed for ought to be granted; for the statute 9 Geo. IV. c. 22, s. 63, authorizes the party entitled to costs to demand the whole amount from any one of the persons liable. The decision in *Gordon v. Gurney* is an express authority that the plaintiff may, if he chooses, confine his suit to one of the persons liable. (2)

Having thus disposed of the objection to the form of the action, there only remains the two objections to the regularity of the proceedings prior to the certificate. The proceedings prior to the resolution are admitted to have been perfectly regular, and it is also admitted that the resolution gave a right to Mr. Fector as against the defendant of recovering some costs, and that the machinery by which the right was to be exercised and the costs ascertained was regular. The only question is, whether the intervening proceedings between the resolution and certificate were regular. Those proceedings are referred to in 9 Geo. IV. c. 22, s. 60, but the description there given of the course to be pursued relative to such proceedings is only directory. And if it be conceded that the provisions of sect. 60, are only directory, then a substantial and not a literal compliance with those provisions is all that is necessary, and the facts stated in the affidavits show that there was a substantial compliance.

The objection taken to the sufficiency of the requisition to the Speaker may be resolved into two parts :—

1st. That, being in writing, the requisition was in substance insufficient.

2nd. That the parties who signed it were strangers.

With respect to the first part of this objection, it is to be observed, that the requisition consisted of two documents, first the letter, and next the account referred to in that letter. If these two documents taken together do not amount to a sufficient application, the onus of showing the insufficiency vests entirely with the defendant. But the defendant has omitted to bring the account under the notice of the Court, nor is it any where stated what was the objection taken before the examiners. The report of the examiners and the certificate show whose costs the examiners understood they were taxing, and the information they obtained could only have been derived from the document withheld, or from inquiries made by them at the time. There is no information before the

(1) Tyrwh. 616. 9 Bingh. 37.

(2) The exception that the action ought to have been brought in the joint names of Fector and Benstead was not taken. *Quærs* of this exception, for it seems to be material : but it was not moved.

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Court to enable them to see whether the examiners acted rightly in this respect or not, and as the defendant, who attaches the proceedings of the examiners, fails to make out any case for impeaching those proceedings therein regularity must be presumed.

As to the latter part of the objection, if the written requisition was sufficient in substance, it is immaterial whether the requisition to the Speaker to tax the costs was made by the plaintiff, by his agent, or by an ordinary messenger so long as it was ratified and adopted by the plaintiff. The requisition was not made for the benefit of the defendant but of Fector, it was not an application which derogated from any existing right of the defendant or conferred any new right on the plaintiff. It was merely a step towards the exercise of a right of the plaintiff which already existed in its fullest extent, the plaintiff, therefore, had a right to adopt the application which had been made in his behalf, and he had adopted it.

The only remaining objection is, on account of the Speaker's certificate having included the costs of Benstead. But this objection only goes to the amount, and the case of *Ranson v. Dundas* (1) decides that the Speaker's certificate is conclusive as to the amount. This case differs entirely from that of *Strachey v. Turley*, (2) there the Speaker certified a joint taxation of costs against two persons who had signed separate petitions which course was not warranted by the statute. In that case the certificate showed a joint award of costs on several petitions, and the Court could not avoid noticing the objection. In the present case the record sets out all the proceedings, and yet there is not the least circumstance, on the face of those proceedings, from which it can be collected that any of Benstead's costs were included in the taxation or that any larger amount was awarded to the plaintiff Fector, than he was legally entitled to receive.

The Court took time to consider the case, and decided in favour of the plaintiff, on the grounds made in his behalf on the argument.

Rule absolute.

(1) 3 Bingham N. C. 123.

(2) 7 East, 507.

CASE XXXVIII.

WIGAN.

The Committee was chosen on the 16th of April, 1839, and consisted of the following Members :—

J. W. Childers, Esq. (Chairman), <i>New Matton.</i>	
E. S. Cayley, Esq. <i>Yorkshire, N.</i>	J. H. Vivian, Esq. <i>Swansea.</i>
Hon. Col. P. Butler, <i>Kilkenny, Co.</i>	F. Hurt, Esq. <i>Derbyshire.</i>
S. H. De Horsey, Esq. <i>Newcastle-under-Lyme.</i>	H. Meynell, Esq. <i>Lisburne.</i>
E. Hollond, Esq. <i>Hastings.</i>	Ralph Etwall, Esq. <i>Andover.</i>
Thomas Hawkes, Esq. <i>Dudley.</i>	Alderman John Humphrey, <i>Southwark.</i>

Petitioner—J. H. Kearsley, Esq.

Counsel for Petitioner—Mr. Thesiger, Q. C. and Mr. Bere.

Agents—Messrs. Adlington, Faulkner, and Follett.

Sitting Member—W. Ewart, Esq.

Counsel for Sitting Member—Mr. Austin and Mr. Cockburn.

Agents—Messrs. Parkes and Preston.

Mr. *Thesiger* opened the case for the Petitioner. The election took place on the 7th of March, 1839, the numbers at the close of the poll were—

Mr. Ewart - - - 261

Mr. Kearsley - - - 259

He stated that the principal matter for the consideration of the Committee would be a case of scrutiny, and intimated that he should endeavour to extend the principle, which has been laid down in the cases of *R. v. Dodworth*, (1) and *R. v. Irvine*, (2) to those voters who

(1) *Ante*, p. 276.

(2) *Ante*, p. 432.

1839.

had parted with a portion of the qualification, in respect of which they were registered, between the time of registration and election. He contended that a person who parted with any portion of the qualification, in respect of which he was registered, lost his right to vote, without being re-registered, and although he admitted that the decisions of Committees, so far as they touched on the question, were unfavourable to his view of the case, yet he should rely on the principles stated in the note of the report of *R. v. Irvine*, in which he fully coincided, and which shewed that the same reasons which establish that a total change of qualification destroys a vote would lead to the same conclusion in the case of a partial loss of qualification.

The poll-books were produced by Mr. Bevan, an alderman of Wigan, who was appointed by the town council to be returning-officer at the election, in consequence of the illness of the mayor.

WILLIAM MILLIGAN'S CASE.

The voter was registered for a 10*l*. house; voted for Mr. Ewart; objected to for change of qualification. He left Wigan on the 29th of August, 1838, leaving the key of his house, with a neighbour, and went to Liverpool, where he carried on the same business as he had followed at Wigan. His furniture was removed, and nothing left in the house for which he was registered, but an oven and a grate, and the house was advertised to be let. The night before the nomination the voter returned to Wigan, and took the key of his house from the person with whom he had left it, and brought back the key to him again after the close of the poll; during the time of his stay at Wigan he did not sleep in his house.

1859.

This case was twice argued and was re-argued at the special request of the Committee.

Mr. Thesiger.—The right of voting is given to every person who shall occupy as owner, or tenant, any house, warehouse, counting-house, &c. The occupation must be considered with reference to the subject-matter to be occupied. A counting-house may be occupied by day by clerks, carrying on business there; a warehouse may be occupied by goods; a house by the personal residence of the voter, or in his absence, by the personal residence of his family or servants, or by leaving his furniture in the house under circumstances indicating an intention to return; but if a person strips his house of all the goods, sends his furniture to a warehouse, leaves no servant in occupation, shuts up the house, gives up the key to a house-agent to dispose of, goes into residence in another house, and evinces no present intention of returning to the house which he has left: in such a case his occupation is at an end. If it were otherwise, the words in 2 Wm. IV. c. 45, s. 27, would be nugatory. It cannot be desirable to give such refined constructions to the clauses in the Reform Act as to encourage those who may be willing to vote, after having lost their qualification, to rely on the contradictory and inconsistent constructions put on these clauses, as a ground for their answering the third question falsely with impunity. If the mere circumstance of the continuance of the right to occupy is sufficient to entitle a registered person to vote, then it must follow as a consequence that if the voter should let or underlet his house, his right to vote would be restored the instant the premises became vacant. And if such right to occupy is sufficient to preserve the qualification of a registered voter, it must also be a sufficient qualification to entitle a person to be placed on the register. And as there is in every case, either an owner or tenant, who has a right to

1839.

occupy every house, the result would be that there can be no such thing as an unoccupied house, that the owner of 1000 vacant houses in the various boroughs which return members is *ipso facto*, the occupier within the meaning of sect. 27 of every vacant house in each of those boroughs, for the purpose of being registered, although every one of those houses is empty, shut up, deserted, the key in the hands of an estate agent, and the owner residing in a foreign country. He cited *Prentice's case, Ipswich*; (1) *Morgan's case, Taunton*; (2) and stated that the only case which could be cited against him was *Hood's case, Kingston-upon-Hull*, (3) which case, he said, was virtually overruled by *Jarrell's case, Kingston-upon-Hull*. (4)

Mr. *Austin*.—The simple question to be decided is, whether a voter who has occupied as tenant, has been registered for such occupation, and retains his right to occupy as tenant, up to the moment of voting, has lost his qualification. There is no case in which this question has arisen clear and disincumbered from other considerations, and it will be found to turn entirely on the construction of 2 Wm. IV. c. 45, s. 27. This is the enfranchising clause, and by it the franchise is given to all persons who occupy as owners or tenants, premises of a certain description and value, if they have complied with certain conditions. Those conditions are, 1st, that the person must be registered; 2nd, that he must have occupied for twelve months before the last day of July; 3rd, that he must have been rated during such occupation; 4th, that he must have paid his rates; 5th, that he must have paid his assessed taxes; 6th, that he must have resided for six months within seven miles of the borough. Now all

(1) *Supra*, 273.

(3) K. & O. 428.

(2) *Supra*, 297.

(4) K. & O. 429.

1839.

these conditions have nothing to do with the qualification, nor is the continuance of any of them necessary in order to the continuance of the qualification. The case has been argued on the other side on the assumption that a registered person cannot be entitled to vote at the time of the election, unless he would then be entitled to be registered, if the registration then took place. This assumption is wholly erroneous. In *Hermitage's case, Rochester*, (1) after a full argument, it was decided, and most properly, that although a party would not be entitled to register without a six month's residence, yet such residence was not necessary to entitle him to vote. That case was decided with reference to freemen, whose rights are conferred by sect. 32, but the same principle applies with equal force to the rights of voting conferred by sect. 27. If a 10 $\frac{1}{2}$ occupier has not been rated, paid his poor-rates, paid his assessed taxes, and resided within seven miles of the borough for six months when he applies to be registered, his title is defective and he must be rejected. But as long as his name is on the register, he will not lose his vote by ceasing to be rated or to pay his rates or to pay his assessed taxes, or to reside within seven miles of the borough. The effect of any of these defects or omissions is, not that a party would lose his vote, but that he would be liable to be struck off the register, at the next registration. It is clear that under the English Reform Act, a man may vote, although not entitled to register. In this respect, there is a difference between the English and Irish Acts. In England the registration is annual, which makes it reasonable that the various conditions of registration, being subject to inquiry once a year, should not be made conditions of the continuance of the right to vote. The registration in Ireland is in force for

(1) K. & O. 83.

1839.

eight years, and consequently the voter is required to take the oath in Schedule (B.) and to swear that at the time of polling he has complied with those conditions which would entitle him to register. The third question in 2 Wm. IV. c. 45, s. 58, is widely different, the voter is not required to state that he has paid his rates or taxes, but simply that he has the same qualification for which he was registered. These considerations are sufficient to dispose of the reference to the qualification to register which has been brought forward as an argument against the vote now under consideration.

Having thus shewn that in order to enable a party to vote, it is not by any means requisite that the voter should be in a situation to prove himself entitled to register, the question arises under sect. 27, what is the meaning of the word "occupy?" In their strictly legal sense, the distinction between the expressions "to hold" and "to occupy" is very slight, and they are often used as convertible terms. The distinction between the meaning of these words are drawn with much nicety in some questions of settlement law arising under 59 Geo. III. c. 50, 6 Geo. IV. c. 57, and 1 Wm. IV. c. 48, in the latter of which statutes, in order to obviate the difficulties which had been previously felt, it was required that the house, land, or building, should be *actually* occupied by the person hiring the same. If the words, *actually* occupy, had occurred in sect. 27, there could have been little difficulty in the application of them to each case, and it may even be conceded, for the sake of argument, that if those words had been used, the present vote would have been bad. But when the distinction between the terms "occupy" and "actually occupy" had been recognised by the legislature in 1 Wm. IV. c. 48, it cannot be contended that in 2 Wm. IV. c. 45, the word "occupy" is to be construed as synonymous with "actually occupy." The proposition

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to be established, in order to support the present vote is, that after a voter has once entered, mere tenancy, with a right to occupy, is sufficient to preserve the qualification.

In *Morgan's case, Taunton*, (1) the tenant had repudiated the tenancy, that is, had ceased to be tenant. In *Prentice's case, Ipswich*, (2) no evidence was given of the subsistence of a tenancy; the only part of the case which would at all tend to such an inference is, that the voter held himself out to be entitled to let.

With regard to *Hood's case, Kingston-upon-Hull*, (3) there is only one fact which militates against the correctness of that decision, *vis.* on June the 1st, Mrs. Allen was put into possession by the landlord, it is probable that this fact was not brought prominently before the attention of the Committee, for it could not have been contended successfully that Hood's vote was good, if the objection to the vote had been put on the ground that he had ceased to have the right to occupy at the time of the election. Again, *Jarrett's case, Kingston-upon-Hull*, (4) is not applicable to the present, for there the voter had ceased to occupy. Thus, with the exception of *Hood's case*, none of those which have been cited is applicable to the present, and it is fair to say of *Hood's case* that it goes too far, so that the question comes back to the construction of sect. 27. If the word "occupy" extends only to cases of "actual" "personal" occupation, then Milligan's vote is bad. But it would be a severe and narrow construction so to restrict that word, especially when the distinction between "occupation" and "actual occupation" had been recognised by the legislature in 1 Wm. IV. c. 48, only the year before the passing of the Reform Act. There are a number of different considerations which would lead to the conclusion, that the more liberal construction of

(1) *Supra*, 297.

(3) K. & O. 428.

(2) *Supra*, 273.

(4) K. & O. 429.

1839.

the word "occupy" is the true one. In an action for use and occupation, it is necessary that the tenant should enter, in order to support the action, *Edge v. Strafford*, (1) but after the tenant has once entered there is no necessity for an "actual occupation," *Pinero v. Judson*. (2) Again, with regard to rating; the rate is imposed on the occupier, yet no one has ever supposed that an actual personal occupation is necessary. The slightest possession, the smallest profit or possibility of profit is sufficient to subject a man to the burden of a rate. Ought then a construction to be put on the clauses of the Reform Act for the purpose of excluding a person from voting, which would not be adhered to if the object of the clause were the imposition of a rate? In the present case, the voter entered on the premises, he has been in actual personal occupation of them, he has been rated as occupier, he has paid those rates, not only up to the time of the election but up to July, 1839, he still continues tenant, he has not underlet or in any way parted with the possession, he still has the full and undisputed right to resume his actual personal occupation at any moment, and it is for the Committee to say whether, under these circumstances, the voter was or was not an occupier, whether he could or could not with propriety, answer the third question in sect. 58 in the affirmative.

Vote held good.

JOHN MILLIGAN'S CASE.

Registered for a 10*l*. house, voted for Mr. Ewart, objected to for change of occupation.

The voter was a yearly tenant, and his holding had

(1) 1 C. & J. 391.

(2) 6 Bingh. 206.

1839. commenced on the 12th of May. In January, 1839, he had agreed, with his landlady, that he should assign over the premises to a new tenant, and that such new tenant should hold the premises immediately from the landlady, beginning from January, 1839. The voter quitted the house, and in order to carry into effect the arrangement which had been made, he let the new tenant into possession, but within a day or two a misunderstanding arose between the new tenant and the landlady, and the new tenant immediately quitted the premises. At the election, the voter claimed the right to enter on the premises, but the key was at that time in the possession of an agent of the landlady, and the voter never actually entered into the premises after the time when he left them in January, 1839.

Mr. *Thesiger* against the vote, contended that even supposing the tenancy of the voter should be held to continue to the 12th of May, 1839, still his having quitted the premises and given up possession to another person made it necessary that he should re-enter after the possession of his assignee had determined, in order to bring himself within the decision in *William Milligan's case*.

Mr. *Cockburn*.—As the landlady has not been called, it is fair to presume that the tenancy of the voter continued up to the 12th of May; and on this assumption the voter had a right to enter and occupy the premises up to the 12th of May, 1839. The continuance of a tenancy, and the right to occupy, are all the requisites necessary to preserve a vote, and so long as these continue, the voter is qualified to answer the third question at the poll.

Vote held bad,

1839.

THOMAS LYON'S CASE.

Voted for Ewart, objected to for having been at the time he voted incapacitated from drunkenness.

After the evidence had been gone through, the most material parts of which are alluded to in the argument of the case, it was

Resolved—That the Committee is unanimously of opinion that the vote is good, but they do not give their judgment till they know whether counsel acquiesce in their view of the case.

Mr. *Thesiger* felt it to be his duty to call the attention of the Committee to those parts of the evidence which bore on the real question before them. A great deal of the evidence which had been given in the case had no bearing on the real issue. It had been attempted to be proved that the voter had promised his vote to Mr. Ewart before the election; evidence had also been given to shew that the voter had promised his vote to Mr. Kearsley, but the whole of this part of the inquiry was irrelevant. It had also been proved that the voter was objected to at the poll, and a great deal of time had been occupied in attempting to determine when the objection was made, whether it was before or after the voting. But this was also irrelevant. The true and only question in the case was, whether the voter was in a fit state at the time he voted to perform any deliberate act. On this part of the case the evidence is perfectly uniform to prove that the voter was completely drunk at the time of his offering himself to vote. One of the witnesses, in support of the vote, stated that the voter was "not particularly drunk at nine," but that he was "more drunk at ten," which was

1839. the last time he saw him. The other witnesses, on both sides, traced the voter's career from ten till he went to the poll, and they shewed that he continued to drink unremittingly, and became more and more drunk till he was quite incapable of knowing what he did, and in this state, at twelve o'clock, he was dragged up to the poll between two supporters. It has been shewn, that at that time of the day other voters came up between two supporters. There was nothing then peculiar to attract attention in this circumstance, yet the bystanders did immediately exclaim upon his condition and called the attention of the assessor to him. The assessor, being present, having an opportunity to observe the state of the voter, and acting under the impression which carried to his mind the certainty of irresistible conviction, decided against the vote. Have the Committee sufficient facts before them, to enable them satisfactorily to overrule the decision of a competent impartial judge, who was present on the spot, and who, on the view pronounced a decision in which he could scarcely have been mistaken? It is proved that the voter was in such a state that no one would have thought of putting the oath to him. The witnesses on the one side say he was insensible; the witnesses on the other side reluctantly admit that he was very drunk. It is clear that no tribunal could decide that the voter was in a state to make any civil contract, can it then be decided that he was in such a state as to entitle him to exercise the electoral franchise? If the case rested only on the evidence which has been produced before the Committee, it would be dangerous to give such a sanction to drunkenness as to allow a vote, given under such circumstances, to be good; but when it is recollected that the present vote cannot be held good, without formally overruling the decision pronounced on the spot by an impartial person, perfectly

competent to decide the question, the sanction given to immorality by upholding the vote would become doubly dangerous. 1839.

Vote held good.

On this decision being made, Mr. Kearsley retired from the contest, and the Committee, after making the usual resolutions, reported to the House that Mr. Ewart was duly elected.



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